92-1717

Supreme Court, U.S.
FILED
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No. ——

In the Supreme Court of the United States

OCTOBER TERM, 1992

BROWN & ROOT, INC., PETITIONER

v.

STEPHEN A. MISTICH, RESPONDENT

Petition for a Writ of Certiorari to the Court of Appeal, Fourth Circuit, State of Louisiana

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether punitive damages are available under the general maritime law in a seaman's unseaworthiness action against his employer.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Brown & Root, Inc. provides the following corporate information. The original defendant in this action was Brown & Root, Inc. On December 31, 1989, Brown & Root, Inc. merged into Brown & Root I, Inc., a Delaware corporation. Brown & Root I, Inc., is wholly owned by Brown & Root Holdings, Inc., which in turn is wholly owned by Halliburton, Inc. In the 1989 merger, Brown & Root Holdings, Inc., assumed certain liabilities of Brown & Root, Inc., including any liability in this case.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.1 STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	5
A. The Court Of Appeal's Decision Is Squarely In Conflict With Those Of Other Lower Courts Holding That Punitive Damages Are Not Available In Unseaworthiness Actions Brought By Or On Behalf Of Jones Act Seamen	6
B. The Decision Below Is Inconsistent With *Miles*	14
C. The Question Presented Is One Of Recurring Importance To The Maritime Industry	19
CONCLUSION	20
APPENDIX A	1a
APPENDIX B	36a
APPENDIX C	37a
APPENDIX D	38a
APPENDIX E	41a

TABLE OF AUTHORITIES

Cases Page

Anderson v. *Texaco, Inc.*, 797 F. Supp. 531 (E.D. La. 1992) 7, 11
Baptiste v. *Superior Court*, 106 Cal. App. 3d 87, 164 Cal. Rptr. 789 (1980) 9
Bergen v. *F/V St. Patrick*, 816 F.2d 1345 (9th Cir. 1987), cert. denied, 493 U.S. 871 (1989) 10
Brown v. *State of Alaska*, 816 P.2d 1368 (Alaska 1991) 8
Brumfield v. *Zapata Gulf Marine Corp.*, No. 90-1319, 1991 WL 174818 (E.D. La. Aug. 28, 1991) 7
City of Newport v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981) 19
Complaint of Aleutian Enter., Ltd., 777 F. Supp. 793 (W.D. Wash. 1991) 7, 11
Cortes v. *Batlimore Insular Line, Inc.*, 287 U.S. 367 (1932) 12
Davis v. *Penrod Drilling Corp.*, No. 91-1458, 1991 WL 264541 (E.D. La. Dec. 2, 1991) 9
Day v. *Woodworth*, 54 U.S. (13 How.) 363 (1852) 19
Donaghey v. *ODECO*, No. 90-0163, 1991 WL 99493 (E.D. La. June 5, 1991), rev'd on other grounds, 974 F.2d 646 (5th Cir. 1992) 7
Ellison v. *Messerschmitt-Bolkow-Blohm*, 807 F. Supp. 39 (E.D. Tex. 1992) 7
Evich v. *Morris*, 819 F.2d 256 (9th Cir.), cert. denied, 484 U.S. 914 (1987) 9
Fitzgerald v. *United States Lines Co.*, 374 U.S. 16 (1963) 19
Haltom v. *Lykes Bros. S.S. Co.*, 771 F. Supp. 179 (E.D. Tex. 1991) 7
Hannon v. *Waterman S.S. Corp.*, No. 90-1175, 1991 U.S. Dist. LEXIS 6823 (E.D. La. May 21, 1991) 9
Harper v. *Zapata Off-Shore Co.*, 741 F.2d 87 (5th Cir. 1984) 13
Hines v. *J.A. Laporte, Inc.*, 820 F.2d 1187 (11th Cir. 1987) 13

TABLE OF AUTHORITIES—Continued

Page

Holmes v. *J. Ray McDermott & Co.*, 734 F.2d 1110 (5th Cir. 1984) 13
Howard v. *Atlantic Pac. Marine Corp.*, No. 89-3073, 1992 WL 55487 (E.D. La. Feb. 28, 1992) .. 7
In re Marine Sulphur Queen, 460 F.2d 89 (2d Cir.), cert. denied, 409 U.S. 932 (1972) 9
In Re Merry Shipping, Inc., 650 F.2d 622 (5th Cir. 1981) ..... *passim*
Incandela v. *American Dredging Co.*, 659 F.2d 11 (2d Cir. 1981) 13
Jenkins v. *Kerr-McGee Corp.*, 613 So. 2d 1097 (La. Ct. App. 1993) 8
Kopczynski v. *The Jacqueline*, 742 F.2d 555 (9th Cir. 1984), cert. denied, 471 U.S. 1136 (1985) .. 4, 11, 17
Kozar v. *Chesapeake & Ohio Ry.*, 449 F.2d 1238 (6th Cir. 1971) 17
Kraljic v. *Berman Enters., Inc.*, 575 F.2d 412 (2d Cir. 1978) 13
La Voie v. *Kualoa Ranch & Activity Club, Inc.*, 797 F. Supp. 827 (D. Haw. 1992) 7, 14
Logue v. *Tidewater, Inc.*, No. 91-1109, 1992 WL 59409 (E.D. La. Mar. 17, 1992) 9
Matter of Mardoc Asbestos Cases, 768 F. Supp. 595 (E.D. Mich. 1991) 7
Matter of Waterman S.S. Corp., 780 F. Supp. 1093 (E.D. La. 1992) 7, 11
McMonagle v. *Northeast Women's Center, Inc.*, 493 U.S. 901 (1989) 10
Memphis Community School Dist. v. *Stachura*, 477 U.S. 299 (1986) 19
Michigan Cent. R.R. v. *Vreeland*, 227 U.S. 59 (1913) 17, 18
Miles v. *Apex Marine Corp.*, 498 U.S. 19 (1990) .... *passim*
Miller v. *American President Lines, Ltd.*, Nos. 91-3602/3837 (6th Cir. Mar. 23, 1993) ..... *passim*
Mobil Oil Corp. v. *Higginbotham*, 436 U.S. 618 (1978) 15
Moragne v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970) 15

TABLE OF AUTHORITIES—Continued

Page

Morales v. *Garijak, Inc.*, 829 F.2d 1355 (5th Cir. 1987) 13
Nelsen v. *Research Corp. of Univ. of Hawaii*, 805 F. Supp. 837 (D. Haw. 1992) 14
Pacific Mut. Life Ins. Co. v. *Haslip*, 111 S. Ct. 1032 (1991) 18, 19
Protectus Alpha Navigation Co., Ltd. v. *North Pac. Grain Growers, Inc.*, 767 F.2d 1379 (9th Cir. 1985) 9-10
Ridenour v. *Holland Am. Line Westours, Inc.*, 806 F. Supp. 910 (W.D. Wash. 1992) 14
Robinson v. *Pocahontas, Inc.*, 477 F.2d 1048 (1st Cir. 1973) 12, 13
Rollins v. *Peterson Builders, Inc.*, 761 F. Supp. 943 (D.R.I. 1991) 7, 11
Rowan Cos. v. *Badeaux*, Nos. 90-0370/0756, 1991 WL 175541 (E.D. La. Aug. 29, 1991) 7
Rubeck v. *Huffman*, 54 Ohio St. 2d 20, 374 N.E.2d 411 (1978) 18
Ryan v. *Transworld Drilling Co.*, No. 91-1110, 1991 WL 278674 (E.D. La. Dec. 20, 1991) 7
Sample v. *Johnson*, 771 F.2d 1335 (9th Cir. 1985), cert. denied, 475 U.S. 1019 (1986) 13
Self v. *Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), cert. denied, 486 U.S. 1033 (1988) 9
Sky Cruises, Ltd. v. *Andersen*, 592 So. 2d 756 (Fla. Dist. Ct. App.), cert. denied, 113 S. Ct. 466 (1992) 7
Stoufflet v. *Apex Towing Co.*, No. 90-4476, 1991 WL 194759 (E.D. La. Sept. 20, 1991) 7
Tarasoff v. *Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334 (1976) 18
Thyssen, Inc. v. *S.S. Fortune Star*, 777 F.2d 57 (2d Cir. 1985) 13
Vaughan v. *Atkinson*, 369 U.S. 527 (1962) 12, 13
Wangen v. *Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437 (1980) 18
Wildman v. *Burlington N. R.R.*, 825 F.2d 1392 (9th Cir. 1987) 17

TABLE OF AUTHORITIES—Continued

Page

Williams v. *Penrod Drilling Corp.*, 845 S.W.2d 349 (Tex. Ct. App.—Beaumont 1992) 9

Statutes

33 U.S.C. § 901 *et seq.* 13
45 U.S.C. § 51 15
46 U.S.C. App. § 688 ..... *passim*
46 U.S.C. App. § 761 *et seq.* 7, 10, 15

Miscellaneous

Comment, 22 J. Mar. L. & Com. 595 (1991) 17
Ghiardi & Kircher, *Punitive Damages Law & Practice* (1985) 18
Keeton, Dobbs, Keeton & Owen, *Prosser & Keeton on the Law of Torts* (5th ed. 1984) 18
Note, Miles v. Apex Marine Corporation: *From Anomaly to Anomaly in Seamen's Remedies*, 37 Loy. L. Rev. 141 (1991) 17
Note, *Sailing the Statutory Seas Toward Uniformity in Maritime Tort Law:* Miles v. Apex Marine Corp., 15 Tul. Mar. L.J. 449 (1991) 17
Schoenbaum, *Admiralty and Maritime Law* (1987) 12

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Petition for a Writ of Certiorari to the Court of Appeal, Fourth Circuit, State of Louisiana

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PETITION FOR A WRIT OF CERTIORARI

Brown & Root, Inc., respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal, Fourth Circuit, State of Louisiana in this case.

OPINIONS BELOW

The opinion of the Court of Appeal (App., *infra*, 1a-35a) is reported at 609 So. 2d 921. The opinions of the district court for the Parish of Plaquemines (App., *infra*, 38a-51a) are unreported.

JURISDICTION

The order of the Supreme Court of Louisiana denying a writ of certiorari to review the judgment of the Court of Appeal was entered on March 12, 1993. App.,

infra, 37a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article III, Section 2 of the Constitution provides:

> The judicial Power shall extend * * * to all Cases of admiralty and maritime Jurisdiction * * *.

2. The Jones Act, 46 U.S.C. App. § 688, provides in pertinent part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply * * *.

STATEMENT

This case presents an important and recurring question under federal maritime law: whether a "seaman" within the meaning of the Jones Act, 46 U.S.C. App. § 688, is entitled to recover punitive damages in an action against his employer under the general maritime law, alleging injury caused by the unseaworthiness of a vessel on which the seaman was employed. The Louisiana Court of Appeal, relying on the Fifth Circuit's decision in *In Re Merry Shipping, Inc.*, 650 F.2d 622 (1981), answered that question affirmatively, upholding a $4,000,000 punitive damages award secured by respondent, a Jones Act seaman, in his lawsuit against Brown & Root. But while the Court of Appeal's decision is consistent with the Fifth Circuit's ruling in *Merry Shipping*, it is in direct conflict with the decision of the Sixth Circuit in *Miller* v. *American President Lines, Ltd.*, Nos. 91-3602/3837 (Mar. 23, 1993), and is difficult to

reconcile with this Court's analysis in *Miles* v. *Apex Marine Corp.*, 498 U.S. 19 (1990). The Sixth Circuit, relying on *Miles*, held in the *Miller* case that punitive damages are not available under the general maritime law in an unseaworthiness action brought by a Jones Act seaman.

This case squarely presents and is an appropriate vehicle for resolving that conflict. More generally, the case would afford the Court an opportunity to dispel widespread uncertainty among the lower courts regarding the availability of punitive damages not only in unseaworthiness cases but in other types of actions brought by Jones Act seamen against their employers. Because the Court of Appeal's decision is erroneous, and because the case presents a recurring question of manifest importance to the maritime industry, the petition for a writ of certiorari should be granted.

1. Respondent worked as a welder for Brown & Root on various pipelaying barges between 1976 and 1984. In connection with his duties, he spent a great deal of time near x-ray cameras used to examine pipe welds for defects. App., *infra*, 41a-42a. These cameras emitted gamma radiation. After developing chronic myelogenous leukemia in 1986, respondent sued Brown & Root and other former employers under the Jones Act and the general maritime law, alleging that his leukemia was the result of excessive exposure to radiation.[1] In his Jones Act claim, respondent contended that Brown & Root was negligent in failing to protect him from excessive exposure, while in his general maritime claim he alleged that Brown & Root's barges were unseaworthy because they did not provide a sufficient shield against radiation. *Id.* at 1a, 8a, 13a.

On April 28, 1989, following a bench trial, the district court for Plaquemines Parish found Brown & Root

[1] The other defendants settled before trial.

negligent and the barges unseaworthy. App., *infra*, 38a-40a. In addition to awarding compensatory damages of $3,147,608 (*id.* at 40a), the court awarded respondent $4,000,000 in punitive damages. Relying (*id.* at 45a) on the Fifth Circuit's decision in *Merry Shipping*, the trial court explained that it was "assessing an amount of punitive damages that will hopefully bring about an alteration of [Brown & Root's] pipelaying vessels to save those other workers who, like the plaintiff, may be still exposed to hazard." App., *infra*, 50a-51a.[2]

2. The Louisiana Court of Appeal reduced the award of compensatory damages but affirmed in all other respects. The court found sufficient evidence of negligence (App., *infra*, 8a-12a) and, relying on the same evidence, held that the vessels on which respondent worked were unseaworthy (*id.* at 12a-13a).

The Court of Appeal also upheld the award of punitive damages. It recognized that in *Miles* this Court had held that the damages available under the general maritime law for the death of, or injury to, a Jones Act seaman may not be more expansive than the damages available under the Jones Act. App., *infra*, 20a. Brown & Root had contended that punitive damages are unavailable under the Jones Act and thus, according to the logic of *Miles*, may not be awarded to a seaman under the general maritime law. The court not only questioned the premise of this argument (App., *infra*, 20a-21a),[3] but in

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[2] Respondent died shortly after trial. The caption of the case in the courts below, however, was never amended to reflect a substitution of parties.

[3] Declining (App., *infra*, 21a n.4) to follow the contrary decision of the Ninth Circuit in *Kopczynski* v. *The Jacqueline*, 742 F.2d 555 (1984), cert. denied, 471 U.S. 1136 (1985), the Court of Appeal stated that "[t]here is no definitive federal or state appellate court decision in this circuit or state holding that punitive damages are not recoverable under the Jones Act, much less under the general maritime law." App., *infra*, 21a.

any event "disagree[d] with the proposition that after *Miles* punitive damages are no longer available under the general maritime law in claims based on unseaworthiness." *Id.* at 21a. Although the court recognized that *Miles* had limited a seaman's recovery under the general maritime law to "pecuniary" losses, it explained that "[p]unitive damages are in a class apart from other nonpecuniary damages" in that "[t]hey serve the purpose of punishing the particular defendant" and "deter others from following that defendant's example." App., *infra*, 21a (footnote omitted). Thus, the court continued, in contrast to the kind of nonpecuniary damages involved in *Miles*—which were "compensatory" in nature—punitive damages "are by nature non-compensatory." App., *infra*, 21a-22a. Applying that principle, the Court of Appeal sustained the punitive damages award against Brown & Root.[4]

REASONS FOR GRANTING THE PETITION

In *Miles* v. *Apex Marine Corp.*, 498 U.S. 19 (1990), this Court held that in determining the kinds of damages that are available under general maritime law, courts must look, first and foremost, to relevant congressional enactments. Where "Congress has spoken directly to the question of recoverable damages," the Court stated, " 'the courts are not free to "supplement" Congress' answer.' " *Id.* at 31. Only in that manner, the Court emphasized, can federal courts ensure "a uniform rule applicable to all actions for the wrongful death of a seaman." *Id.* at 33. Applying that uniformity principle, the Court held

[4] On March 12, 1993, the Supreme Court of Louisiana, with two Justices dissenting, denied Brown & Root's application for a writ of certiorari. App., *infra*, 37a. Because there is a dispute between respondent's estate and certain members of his family as to who is entitled to the proceeds of any judgment in this case, Brown & Root commenced an interpleader action in the United States District Court for the Eastern District of Louisiana, which has entered an order staying execution on the judgment pending a ruling in that proceeding.

that because the Jones Act (which covers injuries to seamen) limits recovery to pecuniary losses and thus excludes damages for loss of society—a nonpecuniary loss —such damages are not available under the general maritime law in an action for the wrongful death of a Jones Act seaman. *Id.* at 32.

The question presented in this case is whether the Court's analysis in *Miles* applies to a seaman's claim for punitive damages in an unseaworthiness action under the general maritime law. The Sixth Circuit ruled in *Miller* v. *American President Lines, Ltd.*, Nos. 91-3602/3837 (Mar. 23, 1993), that *Miles* does apply, and it therefore held that punitive damages are not available in an unseaworthiness action arising from the wrongful death of a Jones Act seaman. Other lower federal and state courts have reached the same conclusion. By contrast, the Louisiana Court of Appeal in the present case has read *Miles* more narrowly, and accordingly has joined the Fifth Circuit and other courts in upholding the availability of punitive damages in actions by seamen under the general maritime law. That conflict, moreover, is symptomatic of a wider disagreement among the federal and state courts concerning the availability of punitive damages in other types of actions brought by Jones Act seamen. In light of the sharp conflict among the Circuits and state courts—and because the question presented is both recurring and of great importance to the maritime industry—review by this Court is warranted.

A. The Court Of Appeal's Decision Is Squarely In Conflict With Those Of Other Lower Courts Holding That Punitive Damages Are Not Available In Unseaworthiness Actions Brought By Or On Behalf Of Jones Act Seamen

1. The Court of Appeal's decision in this case is squarely in conflict with the Sixth Circuit's decision in *Miller* v. *American President Lines, Ltd., supra.* In *Miller,* the personal representative of a seaman asserted

Jones Act and general maritime law claims arising from the seaman's exposure to asbestos and other toxic substances. The court of appeals set aside an award of punitive damages, holding that such damages may *not* be awarded to a Jones Act seaman under the general maritime law. The Sixth Circuit explained that "[u]nder *Miles*, * * * the goal" of a federal court sitting in admiralty "is to articulate a uniform rule regarding the availability of punitive damages in all actions for the wrongful death of a seaman." *Miller*, slip op. at 10. Toward that end, the court continued, "[w]e are to be guided primarily by the congressionally enacted plan of maritime tort law"—principally, the Jones Act and the Death on the High Seas Act, 46 U.S.C. App. § 761 *et seq.* (DOHSA). *Ibid.* Because both of those statutes limit recovery to pecuniary loss, and thus preclude any recovery of punitive damages, the Sixth Circuit concluded that "punitive damages are not available in a general maritime law unseaworthiness action for the wrongful death of a seaman." *Id.* at 13-14.[5]

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[5] Numerous federal district courts have reached the same conclusion. See *Matter of Waterman S.S. Corp.*, 780 F. Supp. 1093 (E.D. La. 1992); *Anderson* v. *Texaco, Inc.*, 797 F. Supp. 531 (E.D. La. 1992); *La Voie* v. *Kualoa Ranch & Activity Club, Inc.*, 797 F. Supp. 827 (D. Haw. 1992); *Ellison* v. *Messerschmitt-Bolkow-Blohm*, 807 F. Supp. 39 (E.D. Tex. 1992); *Haltom* v. *Lykes Bros. S.S. Co.*, 771 F. Supp. 179 (E.D. Tex. 1991); *Rollins* v *Peterson Builders, Inc.*, 761 F. Supp. 943 (D.R.I. 1991); *Matter of Mardoc Asbestos Cases*, 768 F. Supp. 595 (E.D. Mich. 1991); *Complaint of Aleutian Enter., Ltd.*, 777 F. Supp. 793 (W.D. Wash. 1991); *Howard* v. *Atlantic Pac. Marine Corp.*, No. 89-3073, 1992 WL 55487 (E.D. La. Feb. 28, 1992); *Stoufflet* v. *Apex Towing Co.*, No. 90-4476, 1991 WL 194759 (E.D. La. Sept. 20, 1991); *Donaghey* v. *ODECO*, No. 90-0163, 1991 WL 99493 (E.D. La. June 5, 1991), rev'd on other grounds, 974 F.2d 646 (5th Cir. 1992); *Ryan* v. *Transworld Drilling Co.*, No. 91-1110, 1991 WL 278674 (E.D. La. Dec. 20, 1991); *Brumfield* v. *Zapata Gulf Marine Corp.*, No. 90-1319, 1991 WL 174818 (E.D. La. Aug. 28, 1991); *Rowan Cos.* v. *Badeaux*, Nos. 90-0370, 90-0756, 1991 WL 175541 (E.D. La. Aug. 29, 1991). So has at least one intermediate state appellate court. See *Sky Cruises, Ltd.* v. *Andersen*, 592 So. 2d 756 (Fla. Dist. Ct. App.), cert. denied, 113 S. Ct. 466 (1992).

The decision below is directly in conflict with *Miller*. In contrast to the Sixth Circuit, the Louisiana Court of Appeal held that punitive damages *are* available under the general maritime law in a seaman's claim based on unseaworthiness. Indeed, it explicitly "disagree[d] with the proposition that after *Miles* punitive damages are no longer available under the general maritime law in claims based on unseaworthiness." App., *infra*, 21a.[6]

The Fifth Circuit in *Merry Shipping*—on which the Louisiana Court of Appeal relied (App., *infra*, 20a-22a)—also upheld the availability of punitive damages in an unseaworthiness action brought on behalf of a Jones Act seaman. The Fifth Circuit acknowledged that "[d]oubt exists" as to whether punitive damages are available under the Jones Act. 650 F.2d at 626. Nevertheless, the court stated, "[i]t does not follow * * * that if punitive damages are not allowed under the Jones Act, they should also not be allowed under general maritime law." *Ibid.* To the contrary, the court reasoned, because general maritime law "is wholly a product of judicial decisionmaking, fashioned on the basis of tradition and policy," courts are free from any "statutory restraints" that might otherwise "bar recovery." *Ibid.* Surveying prior case law, the court of appeals concluded that "in this Circuit punitive damages may be recovered under general maritime law * * *." *Ibid.*

More recently, the Supreme Court of Alaska articulated the same view. In *Brown* v. *State of Alaska*, 816 P.2d 1368 (1991), a seaman sued his employer under the Jones Act and general maritime law for injuries suffered in the course of his employment as a marine engineer. Relying on the Fifth Circuit's decision in *Merry Shipping*, the Alaska Supreme Court ruled that the

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[6] The same conclusion has been reached by another Louisiana Court of Appeal. See *Jenkins* v. *Kerr-McGee Corp.*, 613 So. 2d 1097, 1107 (La. Ct. App. 1993) (accepting the availability of punitive damages in a general maritime claim, but finding that such damages were not warranted on the facts there presented).

"[d]amages recoverable under th[e] doctrine [of unseaworthiness] include pecuniary and nonpecuniary losses, as well as punitive damages under some circumstances." *Id.* at 1372.

The Texas Court of Civil Appeals in Beaumont—a court that frequently entertains maritime claims—has also recently upheld the availability of punitive damages in a seaman's action under the general maritime law. In *Williams* v. *Penrod Drilling Corp.*, 845 S.W.2d 349 (Tex. Ct. App.—Beaumont 1992), as in the present case, the plaintiff brought an action alleging negligence under the Jones Act and unseaworthiness under the general maritime law. Although the court accepted the view that punitive damages are not available under the Jones Act, it stated that it could find no Supreme Court or Fifth Circuit authority expressly disapproving the availability of punitive damages in an unseaworthiness claim. The court therefore followed *Merry Shipping* and held that seamen are entitled to recover punitive damages under the general maritime law. 845 S.W.2d at 351-352.[7]

Complicating matters still further, the Ninth Circuit has staked out something of a middle position. Where a seaman (or his survivor or representative) alleges *only* a general maritime law claim, the Ninth Circuit has held that punitive damages may be recovered. See *Evich* v. *Morris*, 819 F.2d 256, cert. denied, 484 U.S. 914 (1987); *Protectus Alpha Navigation Co., Ltd.* v. *North*

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[7] See also *Logue* v. *Tidewater, Inc.*, No. 91-1109, 1992 WL 59409 (E.D. La. Mar. 17, 1992); *Davis* v. *Penrod Drilling Corp.*, No. 91-1458, 1991 WL 264541 (E.D. La. Dec. 2, 1991); *Hannon* v. *Waterman S.S. Corp.*, No. 90-1175, 1991 U.S. Dist. LEXIS 6823 (E.D. La. May 21, 1991); *Baptiste* v. *Superior Court*, 106 Cal. App. 3d 87, 164 Cal. Rptr. 789 (1980). Cf. *Self* v. *Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987) (recognizing availability of punitive damages in an action alleging negligence and unseaworthiness), cert. denied, 486 U.S. 1033 (1988); *In re Marine Sulphur Queen*, 460 F.2d 89 (2d Cir.), cert. denied, 409 U.S. 932 (1972) (same).

Pac. Grain Growers, Inc., 767 F.2d 1379 (1985). On the other hand, in *Bergen* v. *F/V St. Patrick*, 816 F.2d 1345 (1987), cert. denied, 493 U.S. 871 (1989), the Ninth Circuit held that punitive damages are *not* available to a seaman who joins a general maritime law claim of unseaworthiness with statutory claims under the Jones Act and DOHSA. Moreover, expressly noting a conflict among the circuits (816 F.2d at 1347 n.1), the Ninth Circuit observed in *Bergen* that it is "not entirely clear" that punitive damages could be recovered where a plaintiff asserts no DOHSA claim, but only general maritime law and Jones Act claims. *Ibid.* That, of course, is exactly the situation here, as respondent joined claims under the Jones Act and the general maritime law.[8]

In short, the question presented in this case—whether a Jones Act seaman may recover punitive damages in an unseaworthiness claim under the general maritime law—continues to divide the federal circuits and state courts.

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[8] Justice White voted to grant certiorari in the *Bergen* case precisely to resolve the conflict between the Ninth Circuit's decision in *Bergen* and the Fifth Circuit's decision in *Merry Shipping*. See *McMonagle* v. *Northeast Women's Center, Inc.*, 493 U.S. 901, 902 (1989) (White, J., dissenting from denial of certiorari and noting his dissent from the denial of certiorari in several other cases, including *Bergen*). The case for review here is stronger, in two important respects, than it was in *Bergen*. First, the very recent decision of the Sixth Circuit in *Miller*, coupled with similar state court and district court decisions, deepens the conflict among the lower courts over the question presented. Second, the relevant facts and claims in the present case (and in the Fifth Circuit's *Merry Shipping* case) are identical to those in the Sixth Circuit's *Miller* decision, thus posing the conflict squarely. By contrast, the seaman's action in *Bergen* was complicated by the joinder of a DOHSA claim, which was not presented in *Merry Shipping* or in this case. Thus, although the Ninth Circuit questioned whether punitive damages would be available in a case lacking a DOHSA claim, it did not expressly resolve that issue and thus did not squarely reject the result in *Merry Shipping*.

Further review by this Court is warranted to resolve that conflict.[9]

2. The conflict concerning the availability of punitive damages in unseaworthiness claims is symptomatic of a wider disagreement among the lower federal courts and state courts concerning the general availability of punitive damages in lawsuits brought by seamen against their employers. In addition to unseaworthiness claims, seamen often bring suits under the Jones Act and the general maritime law based on injuries resulting from an employer's failure to pay maintenance and cure. The lower federal courts are sharply divided over whether punitive damages are available under the general maritime law in maintenance and cure cases, and the ruling sought by petitioner on the question presented in this case would almost certainly resolve that conflict.

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[9] Further review would also give the Court an opportunity to clarify the status of punitive damages under the Jones Act itself, an issue about which the lower courts have manifested uncertainty. Because the argument based on *Miles* (which we develop below) proceeds from the predicate that punitive damages are not available under the Jones Act, resolving the question presented in this case would almost certainly require the Court to address and clarify the scope of damages available under that statute. The court below refused to accept Brown & Root's contention that punitive damages are not available under the Jones Act, stating that it could locate "no definitive federal or state appellate court decision in this circuit or state holding that punitive damages are not recoverable under the Jones Act * * *" (App., *infra*, 21a). The Fifth Circuit in *Merry Shipping* took the same view, although it recognized that there is at least some "doubt" as to the availability of punitive damages under the Jones Act. 650 F.2d at 626. By contrast, the Ninth and Sixth Circuits have expressly held that punitive damages are not available under the Jones Act. See *Kopczynski* v. *The Jacqueline*, 742 F.2d 555 (9th Cir. 1984), cert. denied, 471 U.S. 1136 (1985) (punitive damages are nonpecuniary and therefore not available under the Jones Act); *Miller*, slip op. at 10 (same). Several district courts have reached the same conclusion. See *Anderson* v. *Texaco, Inc.*, 797 F. Supp. 531 (E.D. La. 1992); *Matter of Waterman S.S. Corp.*, 780 F. Supp. 1093 (E.D. La. 1992); *Complaint of Aleutian Enter., Ltd.*, 777 F. Supp. 793 (W.D. Wash. 1991); *Rollins* v. *Peterson Builders, Inc.*, 761 F. Supp. 943 (D.R.I. 1991).

It has long been settled that a seaman who is injured because of his employer's negligent failure to pay maintenance and cure may sue under the Jones Act, and that his personal representative may sue if the failure results in wrongful death. *Cortes* v. *Baltimore Insular Lines, Inc.*, 287 U.S. 367, 376 (1932).[10] The damages recoverable in such suits—like the damages recoverable in any Jones Act suit—are limited to pecuniary loss. But a seaman may also bring an action under the general maritime law for failure to pay maintenance and cure. And there lies the conflict among the courts of appeals—whether punitive damages are available in general maritime law actions for failure to pay maintenance and cure.

The First Circuit has held that punitive damages may be awarded in such actions. *Robinson* v. *Pocahontas, Inc.*, 477 F.2d 1048 (1973). The plaintiff in *Robinson*, a seaman, brought an action for negligence under the Jones Act and for unseaworthiness and maintenance and cure under the general maritime law. Plaintiff recovered an award of punitive damages on the latter claim, which arose from the defendant's failure to pay the plaintiff's medical bills incurred as a result of an on-the-job injury. The First Circuit upheld the award. Relying principally on the dissenting opinion in *Vaughan* v. *Atkinson*, 369 U.S. 527 (1962), the court dismissed as "without merit" the defendant's contention that punitive damages were unavailable as a matter of law. 477 F.2d at 1051.

By contrast, the Second Circuit has held that punitive damages are *not* available in such maintenance and cure

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[10] The ancient duties of a shipowner to provide "maintenance and cure" embody the obligation to provide a seaman who falls ill with, respectively, food and lodging and necessary medical services. See generally Schoenbaum, *Admiralty and Maritime Law* § 5-2 (1987). In *Cortes*, the Court held that a seaman's representative (who at that time could not bring a wrongful death action under the general maritime law) could sue under the Jones Act for the shipowner's alleged negligence in failing to provide the decedent with medical services on board ship. 287 U.S. at 376.

cases, over and above an award of counsel fees. *Kraljic* v. *Berman Enters., Inc.*, 575 F.2d 412 (1978). The court explained that in the *Vaughan* case, "Mr. Justice Douglas, writing for the majority, held that in an action for maintenance and cure the seaman is entitled not only to a recovery of his actual damages but also to an award of counsel fees where the defendant's default is 'callous' or 'willful and persistent.'" *Id.* at 413. The court recognized that the First Circuit had gone further than that in *Robinson*, but it disagreed with that result. "The obvious difficulty with [the First Circuit's] approach," the court observed, "is that the court followed the views of the dissenters in [*Vaughan* v.] *Atkinson* and not the majority." *Id.* at 415. Accord, *Thyssen, Inc.* v. *S.S. Fortune Star*, 777 F.2d 57, 62 n.6 (2d Cir. 1985); *Incandela* v. *American Dredging Co.*, 659 F.2d 11, 15 n.3 (2d Cir. 1981).

More recently, the Fifth and Eleventh Circuits have weighed in on the side of the First Circuit, thus substantially deepening the conflict. In *Holmes* v. *J. Ray McDermott & Co.*, 734 F.2d 1110 (1984), the Fifth Circuit, citing *Robinson*, held that punitive damages are available under the general maritime law for willful and arbitrary refusal to pay maintenance and cure. *Id.* at 1118. Accord, *Morales* v. *Garijak, Inc.*, 829 F.2d 1355 (5th Cir. 1987); *Harper* v. *Zapata Off-Shore Co.*, 741 F.2d 87 (5th Cir. 1984). Similarly, in *Hines* v. *J.A. Laporte, Inc.*, 820 F.2d 1187 (1987), the Eleventh Circuit, noting that the "Circuits are divided" on the question, held that in general maritime law actions for maintenance and cure "both reasonable attorney's fees and punitive damages may be legally awarded in a proper case." *Id.* at 1189.[11]

[11] Dictum in a Ninth Circuit case brought under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, stated that punitive damages are available in some cases for failure to pay maintenance and cure. *Sample* v. *Johnson*, 771 F.2d 1335 (1985), cert. denied, 475 U.S. 1019 (1986). In the absence of a definitive decision from that Circuit, district courts—including two

Although the present case does not involve maintenance and cure, the ruling sought by Brown & Root would substantially resolve that unsettled issue. As we explain at greater length in the discussion that follows, *Miles* stands for the proposition that if a seaman has a cause of action for his injuries under the Jones Act, then courts must look to the Jones Act in determining the damages recoverable in a parallel action under the general maritime law. That principle holds true whether the seaman sues for injuries due to unseaworthiness (as in this case) or for injuries due to the withholding of maintenance and cure. A ruling by this Court on the question presented will likely resolve *each* of these unsettled issues concerning the availability of punitive damages in lawsuits brought by Jones Act seamen against their employers.

B. The Decision Below Is Inconsistent With *Miles*

1. As the Sixth Circuit recognized in *Miller*, the conclusion that a seaman may obtain punitive damages under the general maritime law is difficult to square with this Court's decision in *Miles*. In *Miles*, the Court unanimously held that the representative of a Jones Act seaman could not recover damages for loss of society in a general maritime law wrongful death action based on unseaworthiness. 498 U.S. at 32. The Court explained that Congress and the states have legislated extensively in the field of maritime law, thus obviating the need for injured seamen and their loved ones to seek relief solely under the general admiralty jurisdiction. *Ibid.* "In this era," the Court stated, "an admiralty court should look

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in the same state—have reached opposite conclusions. Compare *Ridenour* v. *Holland Am. Line Westours, Inc.*, 806 F. Supp. 910 (W.D. Wash. 1992) (punitive damages are available in a general maritime law action for failure to pay maintenance and cure) and *Nelsen* v. *Research Corp. of Univ. of Hawaii*, 805 F. Supp. 837 (D. Haw. 1992) (same), with *La Voie* v. *Kualoa Ranch & Activity Club, Inc.*, 797 F. Supp. 827 (D. Haw. 1992) (punitive damages are not available).

primarily to * * * legislative enactments for policy guidance." While courts "may supplement these statutory remedies" in order to promote uniformity, they must "keep strictly within the limits imposed by Congress," which "retains superior authority in these matters." *Id.* at 27.[12]

Applying that principle, the Court explained that because the Jones Act provides a seaman's representative with a cause of action for wrongful death, an admiralty court must look to the Jones Act in determining the available remedies in wrongful death claims under the general maritime law. Under the Jones Act, the Court noted, only pecuniary losses may be recovered.[13] Because damages for nonpecuniary losses are unavailable under the

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[12] The Court noted that this approach to remedies under the general maritime law was consistent with its prior decisions in *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), and *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618 (1978). In *Moragne*, the Court, finding that the Jones Act and DOHSA indicated a congressional policy in favor of wrongful death actions, held that it would not be inconsistent with those statutes to create a wrongful death action under the general maritime law. 398 U.S. at 399-401. The Court applied the same principle in *Higginbotham*, again looking to statutory law as the source of rights and remedies under the general maritime law. In that case, the Court held that because DOHSA expressly provides for the recovery only of pecuniary losses for the survivors of persons killed on the high seas, survivors bringing a general maritime action may not recover damages for loss of society. 436 U.S. at 623. The Court explained that Congress has "struck the balance" regarding the availability of damages for loss of society, and thus it would be improper for an admiralty court to supplement the statutory remedial scheme with a broader measure of damages. *Ibid.*

[13] The Court observed that the Jones Act does not explicitly state the types of damages that are recoverable, but instead incorporates the substantive recovery provisions of the Federal Employers' Liability Act, 45 U.S.C. § 51. See 46 U.S.C. App. § 688(a). The Court explained that the FELA had long ago been construed as limiting recovery to pecuniary losses and concluded that Congress was presumed to have incorporated this limitation into the Jones Act. *Miles*, 498 U.S. at 32.

Jones Act, the Court concluded that nonpecuniary losses —such as the loss of society at issue in *Miles*—are likewise not compensable under the general maritime law. *Id.* at 32. Courts are not free to design maritime law recoveries as they see fit: "It would be inconsistent with [the Court's] place in the constitutional scheme * * * to sanction more expansive remedies in a judicially-created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence." *Id.* at 32-33.

2. The Louisiana Court of Appeal adopted a narrow reading of this Court's decision in *Miles*. The court noted (App., *infra*, 21a) that *Miles* does not, by its terms, address the availability of punitive damages under the general maritime law. Having read *Miles* narrowly, the Court of Appeal "disagree[d] with the proposition that after *Miles* punitive damages are no longer available under the general maritime law in claims based on unseaworthiness." *Ibid.*

The Court of Appeal is, of course, quite correct that *Miles* involved damages for loss of society, not punitive damages. Thus, like the court below, we recognize that the present case is not controlled *a fortiori* by *Miles*. Nevertheless, like the Sixth Circuit in *Miller*, we believe that the "fundamental principle" of *Miles*—that "an admiralty court should look primarily to * * * legislative enactments for policy guidance" (498 U.S. at 27)—is fully applicable to the present case. As in *Miles*, the starting point in this case must be the Jones Act, the federal statute that provided respondent with a cause of action for his injuries. To determine whether punitive damages were available to respondent, the Louisiana Court of Appeal should have looked, first and foremost, to the availability of such relief under the Jones Act.

Had the Court of Appeal done so, it would not have ruled as it did. As noted above (*supra*, at 11 n.9), the only Circuits to have directly confronted the issue have

squarely held that punitive damages are not available under the Jones Act. See *Miller*, slip op. at 13-14; *Kopczynski*, 742 F.2d at 561.[14] Moreover, as the Court explained in *Miles*, "the Jones Act makes applicable to seamen the substantive recovery provisions of the older FELA," which, in the Court's decision in *Michigan Central R.R.* v. *Vreeland*, 227 U.S. 59 (1913), "had been interpreted as providing recovery only for pecuniary loss." 498 U.S. at 32. Under that "pecuniary loss" limitation, it is well settled that the FELA does not permit recovery of punitive damages. *Wildman* v. *Burlington N. R.R.*, 825 F.2d 1392 (9th Cir. 1987); *Kozar* v. *Chesapeake & Ohio Ry.*, 449 F.2d 1238 (6th Cir. 1971). Because the Jones Act must "incorporate the pecuniary limitation on damages as well" (*Miles*, 498 U.S. at 32), it cannot be read to authorize the recovery of punitive damages.[15]

The Court of Appeal suggested, however, that although the Jones Act does not "afford[] recovery for non-pecuniary damages such as loss of society" (App., *infra*, 20a), punitive damages are another matter entirely. "Punitive damages," the Court of Appeal opined, "are

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[14] The Louisiana Court of Appeal regarded this as an unsettled question, having failed to locate any "definitive federal or state appellate court decision in this circuit or state holding that punitive damages are not recoverable under the Jones Act * * *" (App., *infra*, 21a).

[15] See also Comment, 22 J. Mar. L. & Com. 596, 606 (1991) (since punitive damages are unavailable under the Jones Act, *Miles* precludes their award in general maritime claims); Note, Miles v. Apex Marine Corporation: *From Anomaly to Anomaly in Seamen's Remedies*, 37 Loy. L. Rev. 141, 152-153 (1991) (because Congress has shown its intent to proscribe punitive damages under the Jones Act, *Miles* requires that punitive damages be unavailable under the general maritime law). Cf. Note, *Sailing the Statutory Seas Toward Uniformity in Maritime Tort Law:* Miles v. Apex Marine Corp., 15 Tul. Mar. L.J. 449, 463 (1991) (predicting that courts would interpret *Miles* as precluding punitive damages in both Jones Act and unseaworthiness actions).

in a class apart from other non-pecuniary damages." *Id.* at 21a. In particular, the court stated, "unlike the damages for loss of society addressed in *Miles*, and similar non-pecuniary but compensatory damages, punitive damages are by nature non-compensatory." *Id.* at 21a-22a.

The court's effort to distinguish *Miles* is, in our view, problematical. As *Miles* makes clear, the Jones Act—and thus the general maritime law, when invoked by a seaman in an unseaworthiness claim against his employer—limits recovery to *pecuniary* losses. While punitive damages may differ from other kinds of recoveries, they nonetheless do *not* compensate for *pecuniary losses*. And under *Miles*, that should settle the issue: because *only* pecuniary losses are recoverable under the Jones Act, punitive damages—however distinguishable from other categories of nonpecuniary awards—may not be granted under the general maritime law in an action brought by a Jones Act seaman.[16]

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[16] Needless to say, punitive damages do not measure "pecuniary" loss in any sense. As this Court made clear in *Vreeland*—the case that established the "pecuniary" limitation on FELA awards—a pecuniary loss is some quantifiable measure of "assistance or support of which [the beneficiaries] have been deprived," such as the loss of services of a wife, husband or child; or, when the beneficiary is a child, the loss of "care, counsel, training and education which [the child] might * * * have reasonably received from the parent." 227 U.S. at 70-71. Not surprisingly, courts construing wrongful death statutes that provide for recovery of pecuniary losses have consistently held that those statutes do not allow recovery for punitive damages. See, *e.g.*, *Tarasoff* v. *Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334 (1976); *Rubeck* v. *Huffman*, 54 Ohio St. 2d 20, 374 N.E.2d 411 (1978); *Wangen* v. *Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437 (1980). See generally 1 Ghiardi & Kircher, *Punitive Damages Law & Practice* § 5.19 (1985); Keeton, Dobbs, Keeton & Owen, *Prosser & Keeton on the Law of Torts* § 127, at 951 (5th ed. 1984). And these decisions comport with the generally understood nature of punitive damages—which do not compensate for any "pecuniary" loss, and indeed often may exceed actual loss by many orders of magnitude. See generally *Pacific Mut. Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032, 1044 (1991);

C. The Question Presented Is One Of Recurring Importance To The Maritime Industry

Finally, apart from the underlying conflict, the question presented is one of substantial importance to the maritime community. The decision below, from a State that has both a large admiralty docket and a great deal of influence on admiralty law, represents an important (but, in our view, erroneous) pronouncement on the proper approach to assessing damages under the general maritime law.[17] Moreover, the question whether punitive damages are available in general maritime law claims plainly is a recurring one, with federal courts having published at least 17 opinions in the two and one-half years since *Miles* was decided involving the rights of seamen to seek punitive damages.

More generally, because the decision to award punitive damages—and if so, how much—"has been always left to the discretion of the jury" (*Day* v. *Woodworth*, 54 U.S. (13 How.) 363, 371 (1852)), and appears all too often to "'run wild'" (*Pacific Mut. Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032, 1043 (1991)), the question presented has important economic consequences for the maritime industry.[18] "The impact" of punitive damages "is likely to be both unpredictable and, at times, substantial." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 270-271 (1981). As the phenomenon of punitive damages grows, the frequency with which they will be

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Memphis Community School Dist. v. *Stachura*, 477 U.S. 299, 306 n.9 (1986).

[17] The Texas courts in the Gulf Coast region also have a substantial number of maritime cases, and, as noted previously (*supra*, at 9), an intermediate state appellate court in that region has reached the same result as the Louisiana Court of Appeal.

[18] A seamen who alleges claims under both the Jones Act and the general maritime law may obtain a jury trial if he so chooses. *Fitzgerald* v. *United States Lines Co.*, 374 U.S. 16 (1963).

sought by injured seamen will increase and the issue presented here will assume even greater significance. It will therefore be both useful and timely for the Court to decide it now.

Finally, the availability of punitive damages under the general maritime law should not vary according to the forum in which the plaintiff sues. To the contrary, admiralty rules should reflect "a system of law coextensive with, and operating uniformly in, the whole country." *Miles*, 498 U.S. at 27 (internal quotations omitted). This case is an appropriate vehicle for clarifying the governing standard and resolving the conflict among the lower courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1993

APPENDIX A

COURT OF APPEAL OF LOUISIANA
FOURTH CIRCUIT

No. 89-CA-1420

STEPHEN A. MISTICH,

v.

PIPELINES, INC., *et al.*

Nov. 17, 1992

Rehearing Denied Dec. 16, 1992

Before BARRY, KLEES and ARMSTRONG, JJ.

ARMSTRONG, Judge.

In this maritime personal injury case, defendant, Brown & Root, Inc., appeals from a judgment in the amount of $7,147,608.00 rendered against it and in favor of plaintiff, Stephen A. Mistich.

Plaintiff initially filed suit in December 1986 under the general maritime law and the Jones Act, 46 U.S.C.A.App. § 688, claiming he had developed a type of leukemia, chronic myelogenous leukemia (CML), as a result of his exposure to hazardous levels of gamma radiation from x-rays while working as a welder on oilfield pipelaying barges owned by defendant, Brown & Root. Also named as defendants in plaintiff's petition for damages were Lennard Pipelines, Inc., Global Divers and Contractors, Inc., Sea-Con Services, and Santa Fe International, Corp., all

of whom, like Brown & Root, were plaintiffs's former employers.

Plaintiff settled with all defendants except Brown & Root before trial. Brown & Root subsequently moved to continue the trial, but that motion was denied by the trial court. A bench trial was concluded on April 20, 1989, and judgment was rendered on April 28, 1989. The trial court awarded plaintiff $1,147,607.00 in special damages; $2,000,000.00 in general damages; and $4,000,000.00 in punitive damages. On May 14, 1989, plaintiff died of leukemia. The trial court issued ten pages of reasons for judgment on May 25, 1989.

Plaintiff, Stephen A. Mistich, was born on May 4, 1953. He graduated from Belle Chasse high school in 1971 and, in February 1973, began working for Brown & Root as a welder's helper in their Belle Chasse yard. A pre-employment physical revealed no problems except poor eyesight. Until his leukemia manifested itself, Mistich had been hospitalized only once in his life, to have his tonsils removed. He had no record of any serious illness.

At Brown & Root Mistich moved up to tack welder, structural welder and finally to pipe welder. In November 1974 Mistich went to work in Saudi Arabia for two months as a welder foreman. Upon his return he worked for six months with a diving and salvage company where he learned underwater welding, setting a world record for depth welding while there. Prior to being hired by the diving and salvage company, Mistich underwent another thorough physical exam which revealed no physical problems. In the summer of 1975 Mistich went back to work for Brown & Root in its fabrication shop for several weeks before going to work for another company welding pipes and structures on offshore oil platforms, and subsequently another company doing pipe welding. This pattern of working primarily for Brown & Root, but elsewhere during slow periods, more or less continued throughout Mistich's career as a welder. Mistich's primary employer

during his career as a welder was Brown & Root. In late 1983, he received a ten-year continuous service pin from Brown & Root.

Mistich returned to work for Brown & Root in late 1975 or early 1976. In June 1976 he went to work offshore on a Brown & Root pipelaying barge, the No. 278. This was the first time Mistich had worked aboard a pipelaying barge and, according to him, had ever worked around x-ray equipment. Mistich worked on pipelaying barges for Brown & Root at least until 1984. He worked on seven different Brown & Root barges at various times.

Pipelaying barges construct or lay pipelines from onshore to offshore facilities for independent pipeline owners. A company such as Brown & Root would supply the barge, manpower, and pipe necessary to construct the pipelines. Generally, the pipeline owner would hire a testing company to x-ray the completed pipe welds before the pipe would be laid. However, sometimes Brown & Root would hire the testing company.

Brown & Root pipelaying barges are all basically set up the same way. Welding stations forty-feet apart on the starboard or right side of the barge form a kind of assembly line running from bow to stern. Forty-foot sections of pipe are moved down the assembly line of welding stations and, at each station, a different weld is placed on the pipes. The sections of pipe are welded end-to-end to create a continuous pipeline. After the welded sections of pipe are completed the barge is moved forward and the pipeline slides off the stern of the barge down a ramp into the sea.

The final weld is actually done at the fourth station, also known as the capping station. The fifth station is not a welding station but an x-ray station. At that station the completed welds are x-rayed to insure they are not defective. If a defective weld is found, the pipelaying operation stops until the defective weld is ground out and a new one installed. While the defective welds are

being replaced in the x-ray station, the x-ray technicians often "move up" to the fourth station, or capping station, to x-ray another capped weld. Even when there is no defective weld being repaired in the x-ray station, the technicians often move up to the capping station to x-ray the capped weld immediately after it is completed so that if a defective weld is found, it can be repaired in the capping station. Moving up saves valuable time, increasing the barge's productivity. Risers, or angled pipe connections, are often constructed on the deck of the barge and x-rayed there. Also, on occasion, small pipelines are constructed and x-rayed on the open deck of the barge, outside of the welding stations.

The pipe welds are x-rayed with either internal or external x-ray cameras. The internal x-ray cameras are used on pipe 12 inches or larger. An internal x-ray camera is mounted on a crawler device which is operated by remote control. The crawler is sent into the pipe and it moves up to the weld upon which the operator has placed a battery-operated "source." The weld has film placed around it. The operator removes the "source" and the x-ray camera is activated with a five-second delay. One 360 degree x-ray photograph is taken of the weld.

When an external camera is used, three x-rays are taken of the weld, each showing 120 degrees of the weld. The first shot is taken with the camera on top of the pipe at the weld site. The camera is rotated 120 degrees and a second shot is taken, and then a third shot, to photograph the final 120 degrees of the weld. The first shot is directed to the deck, the second out over the water, and the third inboard at an upward angle across the deck of the barge.

Evidence established that on an average day a Brown & Root pipelaying barge would lay 100 forty-foot lengths of pipe. This means on an average day either 100 or 300 x-rays were taken, depending on whether an internal or external camera was used. Evidence showed that crew

quarters were usually located adjacent to the x-ray station. The crews of the pipelaying barges, including welders such as plaintiff, lived and worked aboard the barges while completing the offshore pipelaying jobs. With two twelve-hour shifts, pipelaying went on around-the-clock. While one shift worked, the other ate, relaxed and slept.

Medical evidence established that the type of leukemia plaintiff suffered from had only two known causes: the first, exposure to excessive amounts of gamma radiation, such as from the x-rays used on the Brown & Root barges plaintiff worked on, and the second, exposure to industrial chemicals such as benzene. The causal connection between plaintiff's leukemia and his exposure to any excessive radiation from x-rays while working on Brown & Root pipelaying barges is the primary factual dispute presented by this appeal.

On appeal Brown & Root raises nine assignments of error.

MOTION FOR CONTINUANCE

Brown & Root first argues a procedural matter. It claims the trial court erred in denying its motion to continue the trial after it learned at a pre-trial conference twelve days prior to trial that plaintiff had settled his claims against all other defendants. Brown & Root was given a copy of the joint settlement stipulation on April 9, 1989. Brown & Root requested a continuance to "meet the unexpected shift in the burden of proof occasioned by the settlement." The request was denied and an application for supervisory review on that ruiing was subsequently denied by this court.[1] On appeal Brown & Root also claims the trial court erred further by not relieving defendant of its burden of proving negligence on the part of the settling defendants. Brown & Root argues that it was prejudiced and deprived of an opportunity to ade-

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[1] *In re Brown & Root*, No. 89-C-0587 (La.App. 4th Cir. March 31, 1989).

quately prepare to establish the negligence of the released co-defendants by the trial court's failure to continue the trial. Brown & Root alternatively argues that the trial court erred in failing to proportionately reduce the plaintiff's award by the number of settling co-defendants. In *Raley v. Carter*, 412 So.2d 1045 (La.1982), the Louisiana Supreme Court reversed a decision by this Court which reduced the proportion of fault attributed at trial to one defendant after plaintiff released three co-defendants on the morning of trial. Reversing this court's reduction of plaintiff's award, the Supreme Court stated:

> To hold otherwise would seriously impair pretrial settlement negotiations. Aware of the possibility that a late settlement may result in the reduction of an award rendered after trial with the remaining defendants, a plaintiff may feel forced to choose between an early (and probably unsatisfactory) compromise or proceeding to trial against all defendants. Our courts have repeatedly refused to implement jurisprudential rules which would reduce the plaintiff's incentive to reach settlement with defendants without the need for trial. (Citations omitted.)

One significant difference between *Carter* and the instant case is that the defendant in *Carter* failed to request a continuance, unlike Brown & Root, which immediately did so. However, another and more important distinction is the length of time before trial that the defendant became aware of the settlement. In *Carter*, the co-defendants were released on the day of trial. In the instant case, Brown & Root learned of the settlements twelve days before trial.

In *Danks v. Maher*, 177 So.2d 412 (La.App. 4th Cir. 1965), also cited by Brown & Root, plaintiff settled her malpractice claim against two defendants after trial was almost completed, but before the case was submitted to the jury. This court later reduced plaintiff's judgment

against two other co-defendants by one-half, reasoning that the remaining defendants had been unfairly deprived of an opportunity to establish the joint negligence of the parties released. This case, like *Carter*, can be distinguished by the timing of the settlement, or the length of time before trial that the remaining defendant learned of the settlement.

Considering the length of time before trial that Brown & Root learned of the settlement, at least twelve days, longer according to plaintiff, we are unable to say that the trial court erred in denying the continuance or in not proportionately reducing the award against Brown & Root by the number of released co-defendants.

SCOPE OF REVIEW

The trial court found that Brown & Root was negligent and that Brown & Root pipelaying barges were unseaworthy. This court applies different standards of appellate review to negligence or Jones Act claims, and claims for unseaworthiness under general maritime law. *Osorio v. Waterman Steamship Corp.*, 557 So.2d 999 (La.App. 4th Cir.), *writ denied*, 561 So.2d 99 (La.1990). Jones Act negligence claims are reviewed under a federal standard: "A judgment for plaintiff must be affirmed unless there is a complete absence of supporting facts." *Daigle v. Coastal Marine, Inc.*, 488 So.2d 679 (La.1986); *Thezan v. Maritime Overseas Corp.*, 708 F.2d 175 (5th Cir.1983), *cert. denied*, 464 U.S. 1050, 104 S.Ct. 729, 79 L.Ed.2d 189 (1984). Under the general maritime law, the standard is whether reasonable persons could have arrived at a contrary verdict. *Daigle, supra*; *Fontenot v. Teledyne Movible Offshore, Inc.*, 714 F.2d 17 (5th Cir.1983). Factual findings made by the trial court in a claim under the general maritime law are reviewed under the clearly erroneous standard. *Daigle, supra*; *Parks v. Dowell Div. of Dow Chemical Corp.*, 712 F.2d 154 (5th Cir.1983). The clearly erroneous standard of appellate review is the same manifestly erroneous or

clearly wrong standard of review employed by Louisiana appellate courts in reviewing factual findings of lower courts. *Canter v. Koehring Co.*, 283 So.2d 716 (La. 1973).

In *Rosell v. ESCO*, 549 So.2d 840 (La.1989), the Louisiana Supreme Court commented on the clearly erroneous standard as applied to factual findings based largely on the credibility of fact witnesses. The court stated:

> When findings are based on determinations regarding the credibility of witnesses, the manifest error—clearly wrong standard demands great deference to the trier of fact's findings; for only the fact-finder can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said. Where documents or objective evidence so contradict the witness's story, or the story itself is so internally inconsistent or implausible on its face, that a reasonable fact finder would not credit the witness's story, the court of appeal may well find manifest error or clear wrongness even in a finding purportedly based upon a credibility determination. But where such factors are not present, and a fact-finder's finding is based on its decision to credit the testimony of one of two or more witnesses, that finding can virtually never be manifestly erroneous or clearly wrong. (Citations omitted.)

NEGLIGENCE

Brown & Root raises as its second assignment of error the trial court's finding that it was negligent. We will address causation later. Here, we are assuming that allowing plaintiff to be exposed to radiation in excess of that permitted under state and federal regulations was causally connected to his leukemia. "[U]nder the Jones Act, a vessel owner will be deemed negligent if he fails to exercise reasonable care to maintain a reasonably safe

work environment." *Ceja v. Mike Hooks*, 690 F.2d 1191 (5th Cir.1982). The slightest negligence is sufficient to sustain a finding of liability under the Jones Act. *Johnson v. Offshore Exp., Inc.*, 845 F.2d 1347 (5th Cir.), *cert. denied*, 488 U.S. 968, 109 S.Ct. 497, 102 L.Ed.2d 533 (1988); *Theriot v. J. Ray McDermott and Co., Inc.*, 742 F.2d 877 (5th Cir.1984); *Landry v. Oceanic Contractors, Inc.*, 731 F.2d 299 (5th Cir.1984). Certainly, Brown & Root's duty under the Jones Act encompassed a duty to plaintiff and other crewmen to insure that they were not exposed to gamma radiation in excess of the levels permissible under state and federal regulations.

Brown & Root cites several factual findings by the trial court which are allegedly erroneous. The ultimate factual finding by the court, however, is that Brown & Root was negligent in failing to maintain a reasonably safe work environment; this factual finding is the focus of our review.

We first consider the extent to which plaintiff was exposed to gamma radiation from x-rays. Ronald Wascom, who, at the time of trial, was the Program Manager for the Inspection and Enforcement Section of the Nuclear Energy Division of the Department of Environmental Quality for the State of Louisiana (hereinafter referred to as the NED, for Nuclear Energy Division), testified that in 1967 the NED determined that certain Brown & Root workers had been exposed to excessive radiation from x-raying activities on the pipelaying barge No. 211.[2] Brown & Root was notified of this fact by letter in August 1967. Similarly, in 1969, Brown & Root was notified by letter that an inspection showed that unless protective shielding was installed on its barges, the work-

[2] The No. 211 was the only Brown & Root pipelaying barge inspected because the company's other three barges were essentially identical. In contrast, during a 1976 inspection of McDermott barges, each of its five pipelaying barges was inspected because all were different.

ers in the crew's bunk room would be exposed to an estimated 89,000 millirems of radiation per week, almost 9,000 times greater than the recommended average weekly level of exposure. It was established at trial that plaintiff and other pipewelders normally slept in the bunk room adjacent to the pipe alley. It was recommended in 1969 that a minimum of 2.5 inches of lead shielding be installed in the x-ray station. The NED advised Brown & Root that this amount "was necessary to adequately protect the personnel in those areas adjacent to the x-ray station."

In 1976, NED conducted a follow-up investigation to determine whether protective shielding had been installed on the barges as recommended in 1967 and 1969. The recommended level of protective shielding had not been installed when plaintiff began to work on Brown & Root pipelaying barges in 1976, and it was never installed during the years he worked on the barges. Ronald Wascom testified that in 1976 Brown & Root had only .25 inches of lead shielding on the deck of the barge, under the "pipe alley," in the x-ray station, not the 2.5 inches recommended in 1969. He also said the lead shielding did not extend 7 feet forward and aft of the x-ray station as recommended, and that no shielding had been placed at the ends of the x-ray station as promised by Brown & Root in 1967.

Wascom said that after the 1976 study NED recommended Brown & Root enclose the entire x-ray station in a "protective shield." He said it was recommended that the shield be 1.4 inches of lead. He also stated it could have been constructed of 14 inches of concrete, or 3.5 inches of steel. He said even this would not completely stop radiation penetration into the crew quarters, but would bring it below .5 rads of radiation per year. Wascom testified that the recommended shielding would have only protected from x-raying activities performed in the x-ray station, not x-raying done on the open deck or in the capping station. Wascom said this 1976 report was given to Brown & Root.

The evidence shows that normally, x-rays of completed welds are taken in the x-ray station, the station forty feet away from the capping station where the final weld is placed on the pipe. These x-ray stations on Brown & Root barges never had more than .25 inches of protective lead shielding underneath or around them during the years plaintiff worked for Brown & Root. There is contradictory evidence on what percentage of x-rays were taken in the capping station as opposed to the x-ray station. Plaintiff said 90% of the x-rays were taken in the capping stall. Another Brown & Root worker testified that when he worked with plaintiff, "most" x-rays were taken in the capping stall after the cap weld was placed on the pipe. This witness stated that the technicians would x-ray "as soon as we got out of their way." Another Brown & Root employee testified that most of the x-rays were taken in the x-ray station. X-rays were also taken on the open deck after sections of "risers" were welded together. Finally, on occasion, two pipelines were welded at the same time. One, the normal large diameter pipe, would be welded and x-rayed in the pipe alley. The second, constructed of smaller diameter pipe, would be welded and x-rayed on the open deck.

Wascom testified that the maximum allowable yearly amount of radiation exposure from x-rays for someone, such as plaintiff, was 500 millirems, or .5 rads. He calculated that a person five feet away from a .5 inch thick pipe would receive 50 millirems per x-ray of the pipe, assuming a 30 second x-ray shot. In his 1976 report Wascom stated that Brown & Root typically shoots a 10 inch pipe for 25 seconds per x-ray. External x-ray cameras would take three shots of an average of 100 welds a day, while internal x-ray cameras would take one shot of 100 welds. Dr. Lee Roy Morgan, an oncologist and pharmacist, testified that if plaintiff had been exposed to one x-ray shot per day from the x-ray source used on Brown & Root barges, while standing 5-8 feet from the

pipe, he would have been exposed to 1800 millirems 1.8 rads of radiation, or 1800 millirems [sic], more than three times the maximum allowable annual exposure.

In 1976 plaintiff worked a total of 66 days on Brown & Root pipelaying barges. He worked 143 days in 1977, 112 days in 1978, 109 days in 1980, 168 days in 1981, 38 days in 1982, 126 days in 1983, 22 days in 1984. As will be discussed later, January 19, 1982 is probably the latest date to which a causal connection can be made. Assuming that plaintiff was exposed to only 100 millirems a day for the 66 days he worked on Brown & Root pipelaying barges in 1976, he would have received more than thirteen times the 500 millirem (.500 rems or .5 rads) yearly limit imposed by federal and state regulations. Assuming an exposure of 100 millirems a day, it is more probable than not that plaintiff was exposed to grossly excessive amounts of radiation each year from 1976-1981 while working on Brown & Root barges.

The precautions taken by Brown & Root were inadequate to protect plaintiff from being exposed to levels of radiation in excess of the maximum allowable limit under federal and state regulations. We are unable to say that there was a complete absence of supporting facts for the trial court's finding that Brown & Root failed to maintain a reasonably safe work environment for plaintiff, breaching its duty owed to plaintiff under the Jones Act, and thus was negligent.

UNSEAWORTHINESS

To be considered seaworthy, a vessel and its appurtenances must be reasonably suited for the purpose or use for which they were intended. *Johnson v. Offshore Exp., Inc., supra.* An absolute and non-delegable duty is imposed on the shipowner to furnish a vessel reasonably safe and fit for its intended purpose. *Webb v. Dresser Industries,* 536 F.2d 603 (5th Cir.1976), *cert. denied,* 429 U.S. 1121, 97 S.Ct. 1157, 51 L.Ed.2d 572 (1977).

Any condition rendering the vessel unfit for her intended use makes the vessel unseaworthy. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941 (1960). Unseaworthiness may arise from the employment of an unsafe method of work such as the shipowner's failure to provide adequate equipment for the performance of an assigned task or necessary safety equipment. *Vargas v. McNamara*, 608 F.2d 15 (1st Cir.1979).

Considering the foregoing evidence discussed in addressing plaintiff's claim for negligence, and pretermitting the issue of causation, we are unable to say that the trial court erred in finding that the Brown & Root barges plaintiff worked on from 1976-1984, were unseaworthy. A vessel which exposes its crewmen to levels of gamma radiation grossly in excess of that allowable under federal and state regulations must be deemed unseaworthy.

CAUSATION

The link between exposure to excessive radiation and CML was clearly established by evidence introduced at trial. Dr. David Margileth, both a hematologist and oncologist, began treating plaintiff for CML in California where plaintiff had moved to live with his mother shortly after being diagnosed with CML in January 1986. Dr. Margileth testified that the only two known causes of CML are exposure to radiation and exposure to industrial chemicals such as benzene. Although admitting that in the majority of CML cases a cause cannot be ascertained, he said the overwhelming known cause is exposure to radiation. He equated the relationship of exposure to radiation and CML to the relationship of cigarette smoking to lung cancer.

Dr. Margileth stated that, assuming a radiation physicist found that plaintiff was exposed to excessive amounts of radiation, and assuming that plaintiff was exposed to excessive amounts of radiation on pipelaying barges, it

was his opinion that such exposure to radiation played a role in the cause of his disease. We have already determined the evidence supports the conclusion that, more probably than not, plaintiff was exposed to excessive amounts of radiation during the years he worked on Brown & Root pipelaying barges. Dr. Margileth testified that the latency period, the time between exposure to the maximal chance of developing CML, is a minimum of 3 years, a maximum of 15 years, with the peak being 5-10 years.

Dr. Carl Gustav Kardinal, a hematologist and oncologist, testified that there is a well-documented relationship between CML and exposure to radiation. He said the latency period between radiation exposure and the onset of CML was a minimum of 2 years, a maximum of 10 years, and an average of between 5 and 7 years. Based on plaintiff's diagnosis on January 19, 1986, he estimated that the peak latency period would have been around 1981. However, he could not definitely say that radiation exposure caused plaintiff's CML.

As previously discussed, Dr. Lee Roy Morgan, an oncologist and pharmacologist, testified that if plaintiff was exposed to one x-ray shot per day, with the x-ray device down and in board, while standing 5-8 feet from the pipe, he would be exposed to 1.8 rads of radiation. He concluded that such exposure was sufficient to have caused leukemia cells to develop.

Plaintiff was initially diagnosed with CML by Dr. William Stein. Dr. Stein saw plaintiff as a treating physician only on that one occasion. Plaintiff was later treated by Dr. Stein's partner, Dr. Marcus Black, until June 1986, when plaintiff moved to California. Both physicians are oncologists. Dr. Stein testified on behalf of Brown & Root and identified many problems associated with exposure to radiation other than leukemia. He was asked hypothetical questions about levels of exposure to radiation and noted varying side effects such as the development of cataracts,

thyroid problems, pulmonary fibrosis, hair loss, G.I. tract problems, diarrhea, nausea and vomiting, none of which he found in plaintiff. However, he admitted that a person could be exposed to excessive levels of radiation, that is, in excess of .5 rems per year, without manifesting any of these problems. Dr. Stein testified that, in his opinion, plaintiff's leukemia was not caused by exposure to radiation.

Plaintiff bore the burden of proving that it was more probable than not that Brown & Root's actions in allowing him to be exposed to excessive radiation caused him to develop CML. *See Wisner v. Illinois Central Gulf Railroad*, 537 So.2d 740 (La.App. 1st Cir.1988), *writ den.*, 540 So.2d 342 (La.1989). Courts recognize that medicine is not an exact science and that it is not unusual for medical experts to be unwilling to state unequivocally the cause of a certain malady. *Wisner, supra.* The Louisiana Supreme Court has stated:

> Causation is not necessarily and exclusively a medical conclusion. It is usually the ultimate fact to be found by the court, based on all credible evidence. *Haughton v. Fireman's Fund American Ins. Companies*, 355 So.2d 927 (La.1978).

In the instant case, Dr. David Margileth, plaintiff's primary treating physician, testified that, assuming plaintiff had been exposed to excessive amounts of radiation, it was his opinion that the exposure was a cause of plaintiff's leukemia. Dr. Lee Roy Morgan testified similarly. We have already determined that it was more probable than not that plaintiff was exposed to excessive radiation while working on Brown & Root pipelaying barges.

Considering this evidence, we are unable to say that there was a complete absence of probative facts to support the trial court's finding that it was more probable than not that plaintiff's leukemia was caused by his exposure to excessive radiation, or that such a finding was clearly erroneous.

PLAINTIFF'S COMPARATIVE NEGLIGENCE

Brown & Root next claims the trial court erred in not finding plaintiff comparatively negligent. Plaintiff testified that on one occasion he accidentally stumbled into an x-ray area and apparently was "zapped" by x-rays. Besides that one instance, which he said occurred while working for another employer, there was no direct evidence that he was exposed to excessive radiation through his own fault. Although a seaman has the duty to use reasonable care, the duty to provide a safe work environment lies with the vessel owner. *Ceja v. Mike Hooks, Inc., supra; Osorio v. Waterman Steamship Corporation, supra.* A seaman's duty to protect himself is slight care; not ordinary care. *Pickle v. International Oilfield Divers, Inc.*, 791 F.2d 1237 (5th Cir.1986), *cert. denied*, 479 U.S., 1059, 107 S.Ct. 939, 93 L.Ed.2d 989 (1987); *Osorio v. Waterman, supra.* A seaman is not contributorily negligent simply because he works in an unsafe area of the vessel which was created and/or allowed to exist by the owner. *Ceja, supra.*

Considering a seaman's duty of care, and the evidence of Brown & Root's negligence and maintenance of an unseaworthy vessel, we are unable to say the trial court erred in not finding plaintiff contributorily negligent.

APPORTIONMENT OF FAULT TO OTHER PARTIES

Brown & Root claims the trial court also erred in not apportioning fault equally among all defendants—itself and the defendants plaintiff settled with prior to trial. The evidence undisputably establishes that plaintiff did most of his pipeline welding while employed by Brown & Root. In its reasons for judgment, however, the trial court found that plaintiff was exposed to excessive levels of radiation while working on pipelaying barges owned by four co-defendants with whom plaintiff settled, Pipelines, Inc., Lennard Pipelines, Inc., Sea-Con Service, Inc., and Santa Fe International, Corp.

The trial court further found that plaintiff's employment with all of these companies, except Santa Fe, preceded his January 1986 CML diagnosis by less than four years. Considering the testimony of expert witnesses presented by both sides, the trial court found that the latency period for CML was "not less than three years, but more reasonably in excess of four years," and thus, excluded the possibility of a causal connection between any radiation exposure while working for those employers and plaintiff's CML. Brown & Root takes exception to the trial court's finding as to the latency period and conclusion on causation based on those findings.

Dr. Margileth testified that the latency period for CML was a minimum of 3 years, a maximum of 15 years, with the peak period of developing the disease after exposure being 5-10 years. He testified that, based on plaintiff's white count in January 1986, plaintiff would have been diagnosable "maybe 12 to 18 months before that." Using the minimum of 3 years, and assuming that plaintiff had the disease 12 months before January 1986, was "diagnosable," [sic] the latest plaintiff could have been exposed to radiation which could have caused his disease would have been early January 1982. Dr. Kardinal testified that the average latency period between exposure and onset of CML was 5-7 years. He estimated that the peak latency period in the instant case would have been around 1981.

Brown & Root's own witness, Dr. Stein, answered "most likely" when asked whether one would look at 1981 and earlier for incidences of radiation exposure as a cause of plaintiff's CML. This date was based on plaintiff's having been diagnosed in January 1986, and Dr. Stein's opinion that the most likely latency period would have been 5-10 years from date of exposure.

Plaintiff worked for Lennard Pipelines, Inc. after May 13, 1984; Sea-Con Services, Inc. from January 22, 1982 to March 2, 1982; and Pipelines, Inc. after June 1984.

Based on the evidence adduced at trial pertaining to the latency period between exposure and onset of illness, we are unable to say the trial court would have been clearly wrong in finding that it was more probable than not that any radiation exposure plaintiff may have received while working for Lennard Pipelines, Sea-Con Services, and Pipelines, Inc. was not a cause of his CML.

Plaintiff worked for Santa Fe International from December 22, 1978 to February 25, 1979, nine weeks. In its answers to plaintiff's interrogatories, Santa Fe stated it believed plaintiff worked a 14 days on/7 days off schedule. Based on this schedule, plaintiff would have worked 42 days on an offshore pipelaying barge for Santa Fe. Plaintiff admitted being "zapped" by x-ray radiation on at least one occasion while working for Santa Fe. The evidence indicates, based on plaintiff's own testimony, that the working conditions on Santa Fe pipelaying barges were the same as Brown & Root's. The trial court dismissed the question of liability on the part of Santa Fe because plaintiff worked for that company only a short period of time when compared with his length of employment on Brown & Root barges. Because of the nature of radiation damage, the liability of Santa Fe cannot be dismissed so easily.

Dr. Kardinal testified that when a person is exposed to radiation, cells in the body are damaged, but the body kills them off and allows them to heal. He said when the body can no longer control damage to the cells, such as may occur with prolonged exposure to radiation, then the cells start proliferating, growing uncontrollably, and moving throughout the bone marrow. The longer and more often one is exposed to radiation, the more radiation the body is subjected to, and the greater the likelihood that the body will succumb to the damaged cells and develop leukemia. We have already determined that plaintiff's exposure to excessive radiation while working for Brown & Root between 1976 and 1981 was a cause of his CML. Under these circumstances, it cannot be said that 42 days

of exposure to radiation on Santa Fe barges in late 1978 and early 1979 did not also contribute to plaintiff's CML. The trial court clearly erred in finding otherwise.

Having found that the trial court erred in allocating 100% of fault to Brown & Root, we will now seek to "render any judgment which is just, legal, and proper upon the record on appeal." *Watson v. State Farm Fire and Casualty Ins. Co.*, 469 So.2d 967 (La.1985); La. C.C.P. art. 2164. In *Watson*, the Louisiana Supreme Court set out several factors to consider when apportioning fault among multiple defendants. Under the peculiar circumstances presented by the instant case, however, we find the most equitable apportionment of fault to be according to the percentage of days plaintiff worked for each of the two defendants, Brown & Root and Santa Fe, using January 19, 1982 as a cutoff date.

Plaintiff worked 598 days on Brown & Root pipelaying barges from 1976-1981, and 42 days for Santa Fe pipelaying barges in 1978-79, for a total of 640 days. As a percentage of the total, plaintiff worked for Santa Fe 6.5% of the time, Brown & Root 93.5% of the time. Liability for compensatory damages will be apportioned accordingly.

PUNITIVE DAMAGES

Brown & Root argues that the trial court erred in several respects in awarding plaintiff $4,000,000.00 in punitive damages. It first argues that punitive damages are not allowed under Louisiana law. The trial court rendered judgment in this case according to federal law. To the extent that federal law allows punitive damages in such cases, the award was proper.

Brown & Root also argues that a punitive damage award violates the Due Process Clause of the U.S. Constitution, as "suggested" by the U.S. Supreme Court in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989). The U.S. Supreme Court has issued no definitive ruling holding that punitive damages are violative

of Due Process. To the contrary, subsequent to its decision in *Browning-Ferris Industries*, the U.S. Supreme Court held that a punitive damage award, which was more than four times the amount of compensatory damages awarded, did not violate the Due Process Clause of the 14th Amendment. *See Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. ——, 111 S.Ct. 1032, 113 L.E.2d 1 (1991).

In *Osorio v. Waterman Steamship Corp., supra*, this court held, as a matter of law, that punitive damages are permitted under the general maritime law. *Id.* at 1008; citing *Complaint of Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir.1981). Punitive damages are recoverable upon a showing of willful and wanton misconduct by the shipowner in failing to provide a seaworthy vessel. *Miles v. Melrose*, 882 F.2d 976 (5th Cir.1989). Whether punitive damages should be awarded is an issue for the trier of fact, whether it be judge or jury. *Complaint of Merry Shipping, supra.* A defendant must have been guilty of gross negligence, actual malice, or criminal indifference which is the equivalent of reckless and wanton misconduct. *Miles v. Melrose, supra.*

Subsequent to the lodging of the appeal in the instant case and the filing of original briefs by both parties, the U.S. Supreme Court decided the case of *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990).[3] In a supplemental brief, Brown & Root argues that *Miles* stands for the proposition that punitive damages are not recoverable under the general maritime law in claims for unseaworthiness. In *Miles*, the Supreme Court held that a party cannot recover damages for loss of society in a general maritime action for the wrongful death of a Jones Act seaman. At ——, 111 S.Ct. at 326. In reaching its decision, the *Miles* court looked to whether or not the Jones Act afforded recovery for non-pecuniary damages such as loss of society, which it did not. Brown & Root submits that punitive damages are not recoverable

[3] This was the continuation of *Miles v. Melrose, supra.*

under the Jones Act and, therefore, *Miles* precludes the recovery of punitive damages in claims for unseaworthiness such as in the instant case.

Brown & Root supports this contention by citing a recent federal district court decision interpreting the effects of *Miles* upon the availability of punitive damages under the general maritime law. In *Haltom v. Lykes Bros. Steamship Co., Inc.*, 771 F.Supp. 179 (E.D.Tex.1991), the district court for the Eastern District of Texas specifically held that punitive damages are not recoverable under the general maritime law after *Miles*. Plaintiff cites *Duplantis v. Texaco, Inc.*, 771 F.Supp. 787 (E.D.La. 1991), where the federal district court for the Eastern District of Louisiana held that punitive damages are recoverable under the general maritime law, at least in cases not involving claims based on unseaworthiness.

We disagree with the proposition that after *Miles* punitive damages are no longer available under the general maritime law in claims based on unseaworthiness. There is no definitive federal or state appellate court decision in this circuit or state holding that punitive damages are not recoverable under the Jones Act [4], much less under the general maritime law. Punitive damages are in a class apart from other non-pecuniary damages.[5] They serve the purpose of punishing the particular defendant, hopefully teaching him not to engage in the willful and wanton conduct again. Perhaps even more importantly, punitive damages deter others from following that defendant's example. *See Complaint of Merry Shipping, Inc., supra* at 625. Also, unlike the damages for loss of society addressed in *Miles*, and similar non-pecuniary but compens-

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[4] But see *Kopczynski v. the Jacqueline*, 742 F.2d 555 (9th Cir. 1984), *cert. denied*, 471 U.S. 1136, 105 S.Ct. 2677, 86 L.Ed.2d 696 (1985).

[5] To this extent we disagree with the contrary view of the court in *Neal v. Barisich*, 707 F.Supp. 862 (E.D.La.1989).

atory damages, punitive damages are by nature non-compensatory.

For the foregoing reasons, we hold that plaintiff was entitled to recover punitive damages in the instant case.

There is some conflict in the jurisprudence as to under what circumstances a principal can be held liable for punitive damages for the act of an agent or servant. In *Matter of P & E Boat Rentals, Inc.*, 872 F.2d 642 (5th Cir.1989), the court recognized that a majority of courts hold that vicarious liability of the master for wanton and willful acts done within the course and scope of employment extends to punitive damages even in the absence of approval or ratification. *Id.* at 650. The court also noted that a minority of courts follow the Restatement (Second) of Torts, § 909, and hold the principal liable for punitive damages only if (1) the principal or a managerial agent authorizes the act; (2) the agent was unfit and the principal or managerial agent was reckless in employing or retaining him; (3) the agent was employed in a managerial capacity and was acting in the course and scope of employment; or (4) the principal or a managerial agent ratified or approved the act. *Id.* at 650. Despite its recognition of the majority view, in *Matter of P & E Boat Rentals, Inc.*, the U.S. Fifth Circuit overturned an award of punitive damages, holding that such damages may not be imposed against a corporation when one or more of its employees decides on his own to engage in malicious or outrageous conduct. *Id.* at 652. This holding seemingly departs from both the majority and minority views.

In *McPhillamy v. Brown & Root Inc.*, 810 F.2d 529 (5th Cir.1987), a different panel of the U.S. Fifth Circuit affirmed a punitive damage award in an action under the Jones Act and under the general maritime law based on unseaworthiness. However, the issue of punitive damages was not addressed by the court.

In the instant case we believe the evidence supports an award of punitive damages under either the majority view or the Restatement (Second) of Torts, § 909. In its reasons for judgment in the instant case, the trial court stated:

> This court is shocked and incensed by the conduct of Brown and Root, Inc., in this case. Its management, assuming lay ignorance, was specifically warned of the hazards to its workers over a ten year period and chose to intentionally ignore those warnings.

In August 1967, Walter Gard, Manager, Gulf Coast Area, Pipeline Department of Brown & Root, wrote the Director of Radiation Control of the Louisiana Board of Nuclear Energy (now under the Louisiana Department of Environmental Quality, Nuclear Energy Division and hereinafter refered to as NED) concerning the possibility that its employees were being exposed to excessive radiation. Mr. Gard wrote to "assure [the Director of the NED] of [Brown & Root's] deep interest in [that] subject, affecting as it [did] the health and well being of our employees." In October 1967 he wrote that Brown & Root proposed to place lead sheets under the full length of the x-ray station, on each end of that area, and on the deck side of the station. He proposed to do this on all of their pipelaying barges. Mr. Gard said nothing about providing radiation monitoring devices for workers in the doping station as recommended in 1967 by the NED.

In April 1969 the NED wrote George Batcheller Jr., Brown & Root's Safety Engineer for the Pipeline Department, to recommend that 2.5 inches of lead shielding be installed on the M-211 to protect personnel in those areas adjacent to the x-ray station, i.e., the bunk room, and the x-ray and doping stations. The NED further informed Brown & Root that "this amount of shielding" was necessary to protect personnel in the bunk room from receiv-

ing radiation exposure approximately 10,000 times greater than permissible levels. To protect personnel on the deck, it was recommended that 1.6 inches of lead or 11 inches of concrete be installed to a height of 7 feet off the deck running the length of the x-ray station.

In May 1969, Mr. Batcheller wrote the NED, informing it that Brown & Root had "installed the necessary lead shielding on the M-211 to adequately protect the personnel in the near vicinity of the x-ray station, with respect to [NED's] requirements."

Contrary to this assertion, however, Brown & Root had simply installed .25 inches of lead shielding, one-tenth of the thickness recommended to protect the bunk room. In addition, this shielding had been installed only underneath the x-ray station, and against the bulkhead separating the bunk room from the x-ray station. Brown & Root falsely represented to the NED that it had installed 2.5 inches of lead shielding on the bulkhead to protect crewmen in the bunk rooms from receiving 10,000 times the permisible levels of radiation exposure allowed under federal and state regulation. Further, Brown & Root falsely represented to the NED that it had installed a 7 foot protective barrier constructed of 1.6 inches of lead or 11 inches of concrete to protect workers on the deck from being exposed to excessive radiation.

In 1976, Brown & Root was sent a report from the NED recommending that it install, on the M-211, 1.4 inches of lead or 14 inches of concrete extending under and around the x-ray station to protect personnel in the adjacent bunk room and personnel on the deck. Brown and Root did nothing.

The evidence established that all of Brown & Root's pipelaying barges were similar in design. Although the NED inspected only the M-211, it specifically stated in its 1976 report that it did so because it knew the barges were designed the same. We find that all recommenda-

tions by the NED as to the M-211 are necessarily applied to all of Brown & Root's pipelaying barges.

We find that the trial court was not clearly wrong in finding that Brown & Root's conduct in failing to follow the 1967, 1969, and 1976 recommendations of the DEQ, and in falsely representing to the NED that it had followed the 1969 recommendations, amounted to willful and wanton misconduct on its part. Brown & Root clearly and willfully violated its duty to furnish and maintain seaworthy vessels.

Walter Gard was the Manager of the Gulf Coast Area of Brown & Root's Pipeline Department. George Batcheller Jr. was Brown & Root's Safety Engineer for the Pipeline Department. Both of these persons were endowed by Brown & Root with decision-making responsibility and represented Brown & Root in dealings with the NED concerning protection of Brown & Root employees from excessive radiation. We believe Gard was a "managerial agent" as contemplated by § 909 of the Restatement (Second) of Torts. This type of managerial agent is equated in the Restatement with the principal so that the principal can be held liable for punitive damages for acts the managerial agent authorizes, approves or ratifies, as well as for acts personally done by the managerial agent in the scope of his employment. Batcheller apparently was not such a managerial agent but, nevertheless, acted in a supervisory role and had sizable authority to act on behalf of Brown & Root.

Considering the facts and circumstances of the instant case, we are unable to say the trial court erred in awarding punitive damages against Brown & Root for the wanton and willful conduct of their agents who were clearly acting on behalf of, and in the interest of, Brown & Root.

Brown & Root submits that the $4,000,000.00 punitive damage award was not warranted. Plaintiff argues that the punitive damage award was too small, particularly

when compared to Brown & Root's profits. Plaintiff cites *Kociemba v. G.D. Searle & Co.*, 707 F.Supp. 1517 (D. Minn.1989), in which the court set out a number of factors to be considered by a court in assessing punitive damages.[6] The trial court's reasons for judgment touch on most of these factors which were relevant, indicating that the trial court considered them in making the award of punitive damages.

However, the trial court refused to let plaintiff introduce a financial statement reflecting the earnings of Brown & Root and its percentage of earnings in relation to its parent corporation, Halliburton & Company. Plaintiff proffered that evidence. Assuming for the sake of argument that the revenues of Brown & Root are relevant to the assessment of punitive damages, and that the trial court erred in failing to allow plaintiff to introduce evidence of them, we are unable to say that consideration of that evidence warrants an increase in the trial court's award of punitive damages. We might also note that plaintiff presented no conclusive evidence as to what, if any, portion of Brown & Root's revenues were directly attributable to Brown & Root's failure to insure the safety of its personnel working on pipelaying barges.

On the other hand, considering the nature of the wanton and willful misconduct on the part of Brown & Root

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[6] The factors included:

1. The seriousness of the hazard to the public arising from the defendant's misconduct;
2. The profitability of the misconduct to the defendant;
3. The duration of the misconduct and any concealment of it;
4. The attitude and conduct of the defendant upon discovery of the misconduct;
5. The number and level of employees involved in causing or concealing the misconduct;
6. The financial condition of the defendant; and
7. The degree of the defendant's awareness of the hazard and of its effectiveness.

in light of the factors enunciated in *Kociemba*, we are unable to say the punitive damage award was excessive or a clear abuse of discretion.

GENERAL AND SPECIAL DAMAGES

Brown & Root claims the trial court erred in awarding general and special damages. The trial court awarded plaintiff a total of $3,147,607.70 in general and special damages.

1. *Past and Future Medical Expenses:*

The trial court awarded plaintiff $73,298.78 for past medical expenses, and $186,000.00 for future medical expenses. Brown & Root argues that plaintiff should be precluded from recovering these special damages because he failed to plead them.

Items of special damage must be specially alleged. La.C.C.P. art. 861; *Lanier Business Products, Inc. v. First National Bank of Rayville*, 388 So.2d 442 (La.App. 2d Cir.1980). Medical expenses are special damages, as they can be fixed to a pecuniary certitude. *Lauer v. City of Kenner*, 445 So.2d 1308 (La.App. 5th Cir.1984). Generally, a trial court may not award special damages which have not been specifically pled. *Usher v. Gongre*, 526 So.2d 1307 (La.App. 3rd Cir.1988). The only exception to this general rule is where otherwise inadmissible evidence of special damages is admitted without objection and the pleadings are thereby enlarged to encompass those special damages. *Usher*; La.C.C.P. art. 1154.

In the instant case, the trial court allowed plaintiff to introduce medical bills for his past medical treatment over the objection of Brown & Root. Although there was testimony by physicians concerning plaintiff's diagnosis and treatment, there was no testimony concerning the cost of this treatment. The testimony was directed to establishing the nature of the disease, existence of the

disease in plaintiff, the prognosis for his disease, and the circumstances surrounding his treatment. Under these circumstances, we cannot say the pleadings had been enlarged so that the medical bills were admissible evidence, or that plaintiff was entitled to recover for special damages which he failed to specifically plead in his petition. The trial court erred in awarding plaintiff special damages for past medical expenses.

Future medical expenses were properly awarded for the cost of a bone marrow transplant based on evidence adduced through the deposition testimony of Dr. David Margileth. Brown & Root made no objection when this deposition was read to the jury. Dr. Margileth testified that, at the time of trial, plaintiff's best hope of survival lay with a bone marrow transplant, even one from a donor who was not a perfect match, the only one available at the time of trial. Dr. Margileth stated that there was a possibility that plaintiff could be cured with such a transplant. He testified that bone marrow transplants cost anywhere from $100,000.00 to $1,000,000.00. He further stated that because plaintiff would have a donor who was not a perfect match, his transplant would be more difficult than normal. He estimated that such a transplant would cost $150,000.00. Dr. Margileth mentioned nothing about any other specific future medical expenses. Dr. Kardinal testified that bone marrow transplants range from $150,000.00-$180,000.00.

Future medical expenses must be established with some degree of certainty. *Burton v. Berthelot*, 567 So.2d 649 (La.App. 4th Cir.), *writ denied*, 569 So.2d 989 (La. 1990). However, an award of future medical expenses is in great measure highly speculative and not susceptible of calculation with mathematical certainty. *Burton v. Berthelot, supra; Edwards v. Sims*, 294 So.2d 611 (La. App. 4th Cir.1974), *overruled on other grounds, Harris v. Tenneco Oil Co.*, 563 So.2d 317 (La.App. 4th Cir. 1990).

The evidence established that plaintiff desperately needed a bone marrow transplant, that a potential donor had been located, that the transplant would be a difficult one, and that it could cost anywhere from $100,000.00 to $1,000,000.00. Considering the speculative nature of future damages, we are unable to say that the trial court erred in awarding plaintiff $186,000.00 in future damages.

2. *Future Lost Wages*:

The trial court awarded plaintiff $804,397.00 in future lost wages.[7] Brown & Root argues that the trial court should not have allowed testimony as to future lost income because "the evidence clearly indicated that Mistich would die." Brown & Root states that "virtually all of the doctors" agreed that it was more probable than not that plaintiff "would be dead within six months of March 1, 1989." They cite the deposition of Dr. Margileth for this fact, as they did when addressing future medical expenses. Dr. Margileth did not testify that plaintiff would be dead in six months. He testified that without a bone marrow transplant a patient in plaintiff's condition would live one or two months on the average, six months at the outset. However, this was without a bone marrow transplant. With a transplant, Dr. Margileth testified that plaintiff could not only survive longer, but that there was a possibility he could be completely cured.

The trial court based its award of future lost wages on the calculations of Dr. Melville Wolfson. Brown & Root stipulated that Dr. Wolfson was an expert in the field of forensic economics. Dr. Wolfson averaged plaintiff's income for the years 1982-1985 for a net income figure of $41,833.00. He estimated that plaintiff had an estimated work life expectancy of 25 years, based on U.S. Department of Labor statistics and a life expectancy of 61 years.

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[7] Defendants did not specifically raise or address as an assignment of error the trial court's award of $83,912.00 for plaintiff's past lost wages. Thus, we will not review that portion of the award of damages. *See Uniform Rules—Louisiana Courts of Appeal*, Rule 1-3.

The trial court apparently did not accept the testimony of Brown & Root's economics expert, Dan Cliffe. Cliffe used an average of three years income, 1983-1985, for a figure of $33,416.67. He estimated plaintiff's future lost wages, with an inflation rate of 3.25%, to be $431,075.00. He made no calculations for meals given plaintiff on pipelaying barges, or other fringe benefits such as life insurance, hospitalization, retirement pension, etc.

Before he can recover damages for future lost wages, a plaintiff must prove the loss with reasonable certainty. *Whatley v. Regional Transit Authority*, 563 So.2d 1194 (La.App. 4th Cir.), *writ denied*, 569 So.2d 965 (La. 1990). *See also, McGowan v. Sewerage and Water Board of New Orleans*, 555 So.2d 472 (La.App. 4th Cir.1989). However, such damages need not be proven with mathematical certainty. *Whatley v. Regional Transit Authority, supra.*

The trial court was faced with accepting the testimony of either plaintiff's expert economist, or the expert presented by Brown & Root. We are unable to say that the trial court was clearly wrong in accepting the testimony of plaintiff's expert as to his future lost wages.

3. *Pain and Suffering*:

The trial court awarded plaintiff $800,000.00 in damages for his past and future physical pain and suffering, and $1,200,000.00 for his past and future mental pain and suffering. Brown & Root claims that both of these awards are excessive and an abuse of the trial court's discretion.

A trier of fact has much discretion in the assessment of general damages. La.C.C. art. 2324.1; *Burton v. Berthelot, supra; Landy On Behalf of Landy v. Smith*, 542 So.2d 731 (La.App. 4th Cir.1989). Before an appellate court can disturb a trial court's award of general damages, the record must clearly reveal that the trier of fact abused its discretion in making the award. *Coco v. Winston Industries, Inc.*, 341 So.2d 332 (La.1976); *Harris v. Doucette*, 539 So.2d 997 (La.App 4th Cir.1989). If such

an abuse of discretion is found, the appellate court may look to other awards made in similar cases as an aid to raising or lowering the award to the highest or lowest point which would have been reasonably within the discretion of the jury. *Reck v. Stevens*, 373 So.2d 498 (La. 1979); *Coco v. Winston Industries, supra; Harris v. Doucette, supra.*

a. *Past and Future Physical Pain and Suffering:*

Plaintiff testified that he began experiencing what were symptoms of leukemia sometime in late 1984 or during 1985, the exact period is unclear. He began experiencing night sweats, extreme fatigue, and bleeding gums. He said he "explained away" these symptoms and did not consult a physician. At some point his lymph nodes swelled up and he was treated with antibiotic medication which appeared to remedy the problem. In late January 1986 he sought emergency treatment at West Jefferson Hospital after experiencing severe pain in left side, and night sweats. He went to the hospital about 11:00 p.m. and was told at 3:00 a.m. that he may have leukemia. He was subsequently diagnosed with CML, and remained in the hospital for nine days. Plaintiff testified that the pain in his side, his spleen, was excruciating.

Plaintiff suffered in the chronic stage of CML from January 1986 until late December 1988—early January 1989 when he went into the "blast" or accelerated stage. Until January 1989, Dr. Margileth treated plaintiff with hydrea, medication which suppressed the disease in his bone marrow, lowered his white blood cell count and reduced the size of his spleen. Dr. Margileth testified that the chronic phase of the disease was "very easy" to "control." However, he stated that during the change from the chronic to blast stage the disease becomes more difficult to control, requiring increased dosages of hydrea administered at more frequent intervals. This began happening to plaintiff in late summer 1988.

Dr. Margileth said that when plaintiff actually entered a blast crisis in late December 1988-early January 1989 his spleen was swelling and he was experiencing rib pain and some intermittent fever. In early March 1989 plaintiff was admitted to the hospital and underwent an "aggressive high-dose chemotherapy regimen" to "empty out" his diseased bone marrow in hopes that the "recovered" or "regenerated" bone marrow would be more normal. Dr. Margileth testified that plaintiff "did remarkably well" with this chemotherapy and experienced no nausea or vomiting. He said plaintiff could expect some hair loss, which was beginning at the time of trial.

Overall, plaintiff apparently fared better during his illness than many in his circumstances. However, as of the time of trial, he faced the prospect of continued pain and suffering during his illness and treatment. A difficult transplant operation and recovery lay ahead of him. The transplant operation would have involved high doses of chemotherapy to kill all but the "stem" cells of the bone marrow before the transplant of healthy bone marrow. Dr. Margileth said donor rejection problems would center around the G.I. Tract, and involve a lot of diarrhea, sometimes to the point of dehydration. He also said there could be a skin rash ranging from mild redness to the skin actually coming off, and liver problems, including a cessation of liver function.

Considering how well plaintiff had endured his life-threatening illness and treatment as of the time of trial, the $800,000.00 awarded plaintiff for past and future pain and suffering might be considered on the high side. However, we are unable to say that the award was an abuse of the great discretion afforded the trial court in making these awards.

b. *Past and Future Mental Pain and Suffering*:

Brown and Root claims the award of damages for past and future mental pain and suffering is "incredible" considering that most of the time plaintiff was suffering

from CML he lived "a gratifying and rewarding life, and handled his condition quite well."

Dr. Margileth testified that plaintiff had been an "excellent" patient. However, he also testified that plaintiff took his diagnosis "very poorly." Plaintiff attempted to find work but was apparently not hired because of his disease. The previously active plaintiff was described by his mother as a very tired and depressed individual. She said he would lounge on the couch, watch television and sleep.

Plaintiff testified that it was "very difficult" for him to deal with his diagnosis and illness. He said he attempted to commit suicide on two occasions. He then directed and diverted his energies towards working for leukemia victims. Plaintiff threw himself into fundraising activities for the Tri-County (Orange, Riverside, and San Bernadino Counties, California) Chapter, of the Leukemia Society of America, Inc. In 1988 he was selected as one of the three Poster Team Ambassadors by the Tri-County Chapter. The "ambassadors" were touted as a tribute to the successful treatment of leukemia patients. Plaintiff was also a member of the Orange County Parents Against Leukemia Group. He began working with an organization called The Lifesavers Foundation of America to raise public awareness for the need for bone marrow donors. He also coordinated blood drawings for the National Bone Marrow Registry.

Considering the evidence in light of the great difficulty faced by trial courts in quantifying a plaintiff's pain and suffering, we are unable to say that the trial court abused its discretion in making the award for past and future pain and suffering. While the award may be on the high end of the scale for similar pain and suffering, we cannot say it is excessive.

INTEREST

Brown & Root's final assignment of error concerns the trial court's award of prejudgment interest on one-half of

the amount awarded in compensatory damages. It attributed this one-half to the unseaworthiness responsibility of Brown & Root. Brown & Root claims the trial court abused its discretion in awarding the prejudgment interest and, further, erred in awarding the interest "under Louisiana law."

When a Jones Act claim is tried jointly with a general maritime claim before a judge, prejudgment interest may be awarded at the trial court's discretion. *Osorio v. Waterman Steamship Corporation, supra; Mihalopoulos v. Westwind Africa Line, Ltd.*, 511 So.2d 771 (La.App. 5th Cir. 1987); *Ceja v. Mike Hooks, Inc., supra.* Although within the discretion of the trial court, the allowance of prejudgment interest in general maritime claims is the rule, rather than the exception. *Webster v. M/V Moolchand, Sethia Liners, Ltd.*, 730 F.2d 1035 (5th Cir.1984). Generally, prejudgment interest should be awarded in maritime law. *Curry v. Fluor Drilling Services, Inc.*, 715 F.2d 893 (5th Cir. 1983); *Musial v. A & A Boats, Inc.*, 696 F.2d 1149 (5th Cir.1983).

We see no peculiar circumstances, and Brown & Root points out none, which would justify this court's finding an abuse of discretion in the trial court's awarding of prejudgment interest on one-half of the total award. We also find no support for Brown & Root's claim that the rate of prejudgment interest should not be that provided by Louisiana law.

DECREE

For the foregoing reasons, we amend the judgment of the trial court to apportion fault between Brown & Root and Santa Fe International, Inc. at 93.5% to Brown & Root, 6.5% to Santa Fe, and reduce the special and general damages proportionately. We further amend the judgment of the trial court to eliminate the award of $73,298.78 for past medical expenses. We affirm the judgment as to the award of punitive damages.

Accordingly, we amend the judgment of the trial court to award plaintiff, Stephen A. Mistich, a total of SIX MILLION EIGHT HUNDRED SEVENTY-FOUR THOUSAND FOUR HUNDRED SEVENTY-EIGHT AND 90/100 ($6,874,478.90) DOLLARS, plus interest as specified in the original judgment, itemized as follows:

Past lost wages	$ 78,457.72
Future medical	$ 173,910.00
Future lost wages	$ 752,111.19
Past and Future physical pain and suffering	$ 748,000.00
Past and Future emotional injury, mental pain and suffering	$1,122,000.00
Punitive damages	$4,000,000.00
Total	$6,874,478.90

AMENDED; AFFIRMED AS AMENDED.

APPENDIX B

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

Clerk's Office, New Orleans, Dec. 16, 1992

DEAR SIR:

REHEARING WAS THIS DAY REFUSED IN THE CASE ENTITLED

No. 89-CA-1420

STEPHEN A. MISTICH

v.

PIPELINES, INC., *et al.*

Very truly yours,

/s/ Danielle A. Schott
Clerk of Court

APPENDIX C

THE SUPREME COURT
OF THE STATE OF LOUISIANA

No. 93-C-0146

STEPHEN A. MISTICH

vs.

PIPELINES, INC., *et al.*

IN RE: Brown & Root Inc.;—Defendant(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fourth Circuit, Number 89CA-1420; Parish of Plaquemines 25th Judicial District Court Div. "B" Number 29-703

March 12, 1993

Denied.

PFC
JLD
JCW
HTL
CDK

MARCUS & ORTIQUE, JJ., would grant the writ.

HALL, J., not on panel.

Supreme Court of Louisiana
March 12, 1993

/s/ [Illegible]
Clerk of Court
For the Court

APPENDIX D

25TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF PLAQUEMINES
STATE OF LOUISIANA
DIVISION "B"

No. 29-703

STEPHEN A. MISTICH

versus

PIPELINES, INCORPORATED, *et al.*

Filed: Apr. 28, 1989

/s/ Merlene M. Barthel
Deputy Clerk

JUDGMENT

This matter came on for trial on the 11th day of April, 1989 and concluded on the 20th day of April, 1989.

PRESENT: Lawrence D. Wiedemann, William Hazlaris and Mark A. Pivach, Attorneys for Plaintiff

James F. Holmes, J. Warren Gardner and Jeffrey Christovich, Attorneys for Defendant, Brown and Root, Inc.

The Court, after hearing the evidence, the argument of counsel, and considering the exhibits admitted into evidence by the parties, finds as a matter of fact, as follows:

Plaintiff, Stephen A. Mistich, was unnecessarily and improperly exposed to excessive levels of radiation as a seaman aboard vessels owned by Brown and Root, Inc., Pipelines, Inc., Lennard Pipelines, Inc., Sea-Con Services,

Inc., and Santa Fe International, Inc., over the period June 11, 1976-November 18, 1985.

The exposure to which plaintiff, Stephen A. Mistich, was subjected during his employments with Lennard Pipelines, Inc., Pipelines, Inc., and Sea-Con Services, Inc., was not causally related to plaintiff's condition because the employment periods were subsequent to the latency period for chronic myelogenous leukemia diagnosed on January 19, 1986.

The exposure period during plaintiff's employment with Santa Fe International, Inc. (seven days) is questionably related due to the latency period, but, if related, is de minimis when compared to the exposure period during plaintiff's extended employment with Brown and Root, Inc. over the period 1976-1984 (approximately 1073 days).

The Court finds, as a matter of fact, that Brown and Root, Inc. was negligent and that the various vessels owned by it on which plaintiff worked over the aforesaid period were unseaworthy. The Court also finds, as a matter of fact, that the negligence of Brown and Root, Inc. was a cause-in-fact, and the unseaworthiness of Brown and Root, Inc.'s vessels was the cause-in-fact of plaintiff's chronic myelogenous leukemia due to exposure to excessive levels of radiation; each of the aforesaid theories of fault contributing equally to plaintiff's injuries and damages.

The Court finds, as a matter of fact, that plaintiff did not contribute in any way to the injuries, or damage, sustained by him.

The Court apportions the fault of plaintiff's Jones Act/General Maritime employers, as follows:

Brown and Root, Inc.	100%
Pipelines, Inc.	0%
Lennard Pipelines, Inc.	0%
Sea-Con Services, Inc.	0%
Santa Fe International, Inc.	0%

The Court finds that plaintiff is entitled to compensatory damages in the sum of THREE MILLION ONE HUNDRED FORTY-SEVEN THOUSAND SIX HUNDRED EIGHT AND NO/100 ($3,147,608.00) DOLLARS, itemized as follows:

Past Medical	$ 73,298.78
Past lost wages	$ 83,912.00
Future medical	$ 186,000.00
Future lost wages	$ 804,397.00
Past and Future physical pain and suffering	$ 800,000.00
Past and Future emotional injury, mental pain and suffering	$1,200,000.00

The Court further finds, as a matter of fact, that the conduct of Brown and Root, Inc. was willful and in gross disregard of plaintiff's rights, and accordingly, awards to plaintiff punitive damages in the sum of FOUR MILLION AND NO/100 ($4,000,000.00) DOLLARS.

Finally, the Court utilizes its discretion and awards prejudgment interest from the date of judicial demand on one-half (½) of the amount awarded in compensatory damages, at the legal rate provided under Louisiana law, and herewith taxes all costs against defendant, Brown and Root, Inc.

JUDGMENT READ, RENDERED AND SIGNED at Pointe-a-la-Hache, Louisiana, this 28th day of April, 1989.

/s/ [Illegible]
Judge

APPENDIX E

25TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF PLAQUEMINES
STATE OF LOUISIANA
DIVISION "B"

No. 29-703

STEPHEN A. MISTICH

versus

PIPELINES, INCORPORATED, *et al.*

Filed: May 25, 1989

/s/ Jeanine H. Kuhlman
Deputy Clerk

REASONS FOR JUDGMENT

The Court rendered Judgment in the above entitled and numbered cause on the 28th day of April, 1989, assessing compensatory and punitive damages against defendant, Brown and Root, Inc., in the total sum of $7,147,608.00.

Stephen A. Mistich, presently 35 years of age and a father of three legally adopted children, worked as a seaman/welder aboard various pipelaying barges owned by Brown and Root, Inc., Pipelines, Inc., Lennard Pipelines, Inc., Sea-Con Services, Inc., and Santa Fe International, Inc., over the period June 11, 1976-November 18, 1985.

On all the barges on which plaintiff worked over the aforesaid period, each weld would be x-rayed either by an internal, or external, x-ray machine. The evidence preponderates that external x-ray machines were predominantly used on the vessels on which plaintiff worked over the period in question, and further preponderates that the radiation source was typically 100 curies of Iridium-

192. Each weld would be x-rayed following the finishing weld in the "capping" station. The external machine would make three shots of each weld of approximately thirty seconds duration. Each shot would cover a 120 degree section of the weld. The first weld would be shot from the top of the pipe downward; the second shot would be from the outboard side of the pipe inboard; and the third shot would be from the inboard side of the pipe outboard. The internal x-ray machine, which was infrequently used on the barges on which plaintiff worked, would shoot one 360 degree shot of the weld from the inside of the pipe in all directions. The plaintiff, William Reinhardt, "Buddy" Pruett, and Mitchell Tidwell testified that the barges would average eighty welds per day and that a majority of the x-rays would be shot in the "capping" station, as opposed to the designated x-ray station, with the capping welders six to eight feet away and unprotected. This testimony is basically uncontradicted. Defendant produced no evidence or testimony to refute plaintiff, Pruett, or Tidwell. The record contains a great deal of testimony by Brown and Root witnesses as to the policy and guidelines to be employed and implemented by the x-ray technicians but not any testimony as to whether these were actually carried out or enforced in connection with the day to day operation. The evidence establishes that this process of "moving up" to x-ray the welds was dictated and directed by Brown and Root, Inc., and was carried out in order to maintain a high level of production.

The crew quarters and crew facilities on which plaintiff worked were either directly below the "pipe alley", or immediately adjacent to the "pipe alley", the "pipe alley" being a trough on the port side of the vessel where the pipe moved along on rollers to receive its various services, including x-ray. The welders, like plaintiff, customarily slept in the quarters beneath their working stations, the theory being that a worker's replacement on an opposite shift would follow the "golden rule".

On pipelaying barges, the welders would tend to work in stations wherein the job performed most fitted their individual skill. Although the welders rotated from station to station on some barges, the evidence preponderates that the plaintiff herein most often worked in the capping station, which was the station closest to the x-ray station. Accordingly, he frequently slept in the quarters beneath, or adjacent to the x-ray station.

The evidence unequivocally established that the State of Louisiana, Department of Environmental Quality, Office of Air Quality and Nuclear Energy, on three occasions inspected pipelaying barges owned by Brown & Root, Inc., and McDermott, Inc., for the specific purpose of determining if there was a radiation hazard to the workers on the barges from the x-ray activities. The inspections were made in 1967, 1969, and 1976. Each report was sent to Brown & Root, Inc. management. The 1967 report was sent to Mr. Walter Gard, Manager of the Pipeline Department; the 1969 report was sent to Mr. George Batcheller, Jr., Safety Engineer; and the 1976 report was sent to Mr. Claude Adams, Safety Supervisor, and Mr. W. C. Jones, Terminal Manager. The 1967 report put Brown and Root, Inc., on notice that the workers in stations adjacent to the x-ray station were subject to radiation exposure in excess of the maximum quarterly allowable dosage, established by the United States Nuclear Regulatory Commission, 10 CFR ch. 1, Part 20, and adopted by Louisiana through the Department of Environmental Quality, Office of Nuclear Energy, as an agreement state, Title 33 of the Louisiana Radiation Regulations, Part 15, Ch. 4, page 95, et seq. The report specifically cautioned Brown and Root, Inc., that personnel monitoring be provided in order to adequately determine the radiation exposure of the workers in the area adjacent to the x-ray station, or alternatively, that fixed shielding be provided to intercept the scattered radiation from the x-ray activities. The evidence clearly establishes that

Brown & Root, Inc., did not furnish the workers with the monitoring suggested and did not install the fixed shielding to intercept the scattered radiation. Finally, the report cautioned that persons in the living quarters might be exposed to excessive radiation if radioactive materials, such as Iridium-192, were used. Pruett testified that on one occasion a monitoring device was to be installed in the crew quarters, which was done but no results were revealed to any welder and no official report was made and if made was not presented at trial.

The 1969 report, based on work load calculations provided by Brown & Root, Inc., concluded that personnel in the bunk room adjacent to the x-ray station would be exposed to 89,000 mR per week, which would be 10,000 times the permissible level of 10mR per week maximum under the aforesaid applicable regulations. The report went on to recommend the installation of 2.5 inches of lead shielding, seven feet aft and seven feet forward of the x-ray station on the pipe alley deck; on the pipe alley bulkhead between the pipe alley and the bunk area; and three feet back from the pipe alley bulkhead on the main deck above the bunk area. The intention of the foregoing being to totally insulate the crew in the bunk, and living areas, below the x-ray station from radiation. The report went on to recommend 1.6 inches of lead or 11 inches of concrete seven feet high running the fourteen foot length of the x-ray area to protect personnel on deck from radiation. None of the foregoing were done by Brown and Root, Inc. The 1976 report confirms Brown and Root, Inc.'s non-compliance with the 1967 and 1969 reports because it established the presence of only .25 inches of lead on a portion of the bulk head between the pipe alley and the bunk space. It discloses no lead on the deck of the pipe alley, no lead on the top of the bunk area, inadequate lead between the bunk area and the pipe alley, and no lead shield to protect the personnel on deck. The 1976 report went on to establish the potential of excessive

allowable radiation exposure and recommended the installation of a 2-½ inch lead, or fourteen inch concrete, enclosure above, inboard and below the x-ray station to protect personnel on deck and personnel in the bunk area, or living quarters. Every witness, including Brown and Root's witnesses, testified that the 1976 recommendations of the Louisiana Division of Radiation Control were never complied with by Brown and Root, Inc. All of the foregoing inspections and recommendations occurred prior to the time that plaintiff went aboard a Brown and Root, Inc. pipelaying barge in 1976.

Every adult lay person in this country knows that radiation is an ultra-hazardous activity and that those persons working with, or around, it on a daily basis must insulate themselves therefrom with lead lining. The court is shocked and incensed by the conduct of Brown and Root, Inc., in this case. Its management, assuming lay ignorance, was specifically warned of the hazards to its workers over a ten year period and chose to intentionally ignore those warnings. In addition to the foregoing, a Brown and Root barge captain, Mr. "Buddy" Pruett testified that he requested lead from the Safety Department over a two-year period and was ultimately furnished with only .25 inch lead sheeting to insulate a portion of the bulk area on his barge. This Court would be remiss and insensitive were it not to conclude that Brown and Root's conduct was willful, callous, and in total disregard of the rights of its employees. No case could better fit the punitive damage prerequisite of the United States Fifth Circuit Court of Appeals in *In Re: Merry Shipping Co.*, 650 F.2d 622 (1981) than the instant case.

All of the physicians that testified in this case concurred in plaintiff's diagnosis of chronic myelogenous leukemia. Additionally, every medical witness that testified concurred that exposure to excessive levels of radiation is an accepted cause of leukemia, and chronic myelogenous leukemia specifically. The foregoing accepted causal relationship

originally grew out of the experience of radiologists thirty or forty years ago prior to the recognition of the necessity for lead shielding, and was confirmed by the unfortunate aftermath of Nagasaki and Hiroshima. In all of the foregoing unfortunate populations, grossly excessive levels of leukemia, including chronic myelogenous leukemia, were detected following radiation exposure. Dr. David Margileth and Dr. Lee Roy Morgan both testified that plaintiff's chronic myelogenous leukemia was, in their opinion, legally caused by his exposure to excessive levels of radiation. The court was impressed with the expertise, demeanor, candor, and honesty of these two dedicated physicians. Dr. Marcus Black and Dr. Carl Kardinal testified that they could not say that radiation exposure did, or did not, cause plaintiff's chronic myelogenous leukemia, although both admitted that they accepted the fact that radiation does cause plaintiff's type leukemia. Their vanilla testimony was of no help to the Court because neither was willing to render an opinion one way, or the other. Since an expert can only express an opinion, an expert that is unwilling to express an opinion adds nothing to the decision making process. The testimony of Dr. William Stein, who saw the plaintiff on one occasion, is totally disregarded by the Court. Dr. Stein's adversarial demeanor and willingness to make unsupported and unwarranted conclusions, leads this court to conclude, as a matter of fact, that his testimony is unworthy of belief. The court further noted that Dr. Stein relied only on treatises and writings of other medical doctors, however the testimony of all other Doctors testifying was very positive, that no case histories, by the very nature of the disease, had ever been conducted by the medical profession, therefore the court concluded that the testimony of Dr. Stein is based solely on theories expounded by the persons he quoted and on which he based his opinion on.

The standards for protection against radiation passed by the United States Nuclear Regulatory Commission, and the standards for protection against radiation passed

by the Louisiana Office of Nuclear Energy, aforecited, were specifically passed for the purpose of protecting the American and Louisiana worker from the hazard, among others, of cancer and leukemia associated with excessive radiation exposure. Those regulatory bodies recognized that exposure to greater than 0.5 rem in any one calendar year places the exposed person at risk of cancer or leukemia.

Mr. Ronald Wascom, an employee of the Louisiana Division of Radiation Control, and the author of the 1976 report, testified that the plaintiff herein was exposed throughout his employment, to levels of radiation greatly in excess of the maximum annual allowable, and the court as a matter of fact, concludes that to be the case based on all of the evidence brought out at the trial including, but not limited to, the testimony of Mr. Wascom.

The Court finds, as a matter of fact, that the plaintiff's chronic myelogenous leukemia was directly caused by his exposure to excessive levels of radiation.

The Court as a matter of fact, also finds that the vessels on which plaintiff worked for Brown and Root, Inc., were unseaworthy, and that Brown and Root, Inc., was negligent.

The Court concludes that the aforesaid unseaworthiness was the cause, and the aforesaid negligence a proximate cause, of plaintiff's contraction of leukemia, each theory of liability contributing equally to plaintiff's injuries and damages.

Plaintiff, as a matter of fact, was also exposed to excessive levels of radiation while working on barges owned by Pipelines, Inc., Lennard Pipelines, Inc., Sea-Con Service, Inc., and Santa Fe International, Inc., with whom the plaintiff settled 21 days prior to trial for the sum of $250,000.00. The settlement with these defendants is reflected in a stipulation filed in the record of the case prior to commencement of the trial against Brown and

Root, Inc. The Court accepted plaintiff's testimony that the conditions were basically no different on the barges owned by the settling defendant than those heretofore described on the barges operated by Brown and Root, Inc. The only factual difference between the posture of the settling defendants is the absence of any prior inspection or warning, by any regulatory agency, and the fact that plaintiff's employment with the settling defendants, with the exception of Santa Fe International, Inc., preceded plaintiff's diagnosis of chronic myelogenous leukemia on January 19, 1986, by less than four years.

The Court considered the possible liability of the settling defendants for the purpose of apportioning fault as required under General Maritime Law.

The testimony of all of the physicians that testified in this case, and the Nagasaki and Hiroshima experiences, establishes, beyond a doubt, that there is a definite latency period between radiation exposure and the advent of symptoms of cancer, or leukemia, induced by radiation.

The Court finds as a matter of fact, that the applicable latency period is not less than three years, but more reasonably in excess of four years. Accordingly, plaintiff's employment with all of the settling defendants, with the possible exception of Santa Fe International, Inc., were subsequent to the latency period and, accordingly, had no causal relationship with plaintiff's contraction of chronic myelogenous leukemia. The Court further finds that plaintiff, during his employment with Santa Fe International, Inc., could have been exposed to radiation from x-ray for a maximum of seven days and concludes that such exposure, if within the latency period, is de minimis when compared with the length of exposure, (approximately 1,073 days), with Brown and Root, Inc. Therefore, the Court has concluded that plaintiff's exposure during his employment with Brown and Root, Inc., contributed 100% to his contraction of chronic myelogenous leukemia, whereas his employment with the settling defendants contributed 0%.

Turning now to the Court's evaluation of compensatory damages due by Brown and Root, Inc. to plaintiff, predicated upon the Court's heretofore determination of negligence and unseaworthiness, the Court, as a preamble, is constrained to cite the Louisiana First Circuit Court of Appeal decision in *Wisner v. Illinois Central Gulf Railroad, et al*, 537 S.2d 740 (1988), wherein the Court affirmed, with moderate modifications, a $2,794,000.00 jury verdict in favor of a 35 year old Louisiana State Trooper. In the *Wisner* case, the plaintiff claimed damages for lung impairment and fear of cancer as a consequence of exposure to unconfirmed levels of toxic chemicals. In the instant case, the plaintiff has confirmed chronic myelogenous leukemia secondary to established levels of radiation grossly in excess of the maximum annual allowed exposure.

The Court was impressed by the testimony of Dr. Melville Wolfson, the plaintiff's economist, and the reasonableness of the acceptable criteria utilized by him in reaching his calculations. The Court on the other hand, found the testimony of defendant's economist, Dr. Dan Cliffe, to be devoid of acceptable criteria to impress this Court with the accuracy of his calculations. For instance, his utilization of present day earning factors and inflationary factors spanning seventy-five years preceding trial, do not measure up to a standard of objectivity. The Court finds as a matter of fact, that plaintiff sustained past lost wages in the sum of $83,912.00 and future lost wages in the sum of $804,397.00 both testified to by Dr. Melville Wolfson.

Dr. Margileth, and Dr. Carl Kardinal, testified that a bone marrow transplant, alone, one of the reasonably anticipated procedures that plaintiff will have to undergo, would cost between $100,000.00 and $1,000,000.00 depending on the rejection factor ever present in such a procedure. Plaintiff was hospitalized in a blast state one month preceding trial at a cost in excess of $50,000.00

and according to Dr. Margileth, is certain to be hospitalized for additional chemotherapy and radiation treatment prior to institution of a bone marrow transplant procedure. Therefore, the Court feels that an award for future medical expenses of $186,000.00 is conservative considering the foregoing testimony.

The parties stipulated to plaintiff's past medical bills totaling $73,298.78, reserving defendant's objection to the causality. The Court finds that the stipulated bills were in fact causally related to plaintiff's exposure to radiation and contraction of chronic myelogenous leukemia, and, accordingly, finds that amount due by defendant.

The Court can think of no set of circumstances that could possibly produce greater physical pain, mental anguish, fear of death, loss of ability to enjoy life, and loss of ability to pursue happiness than the set of circumstances that confronted and continued to confront the plaintiff in this case. The Court was moved by the sincerity, intelligence, desire for life, and determination to survive exhibited by this young man during the course of this trial.

The Court feels that an award of $800,000.00 for pain and suffering and $1,200,000.00 for mental anguish, both encompassing the other elements heretofore addressed, to be fair compensation for those elements of damage.

Ten years of warnings, which if heeded, could have saved this young man, were intentionally ignored by defendant herein. The State of Louisiana could not get the defendant's attention by direct notification to defendant's management personnel. It is incumbent upon this Court, therefore, to attempt to get the defendant's attention by assessing an amount of punitive damages that will hopefully bring about an alteration of their pipelaying vessels to save those other workers who, like the

plaintiff, may be still exposed to hazard. The Court awards to the Plaintiff the sum of $4,000,000.00 in punitive damages for the foregoing reasons.

The Court, under the discretion vested in it, awards interest, at the legal rate provided under Louisiana Law, on one-half of the foregoing compensatory damage award attributable to the unseaworthiness responsibility of defendant from date of judicial demand and legal interest at the rate provided under Louisiana Law, on the remainder of the judgment, compensatory and punitive, from date of judgment until paid.

The Court further casts defendant for all costs of these proceedings.

/s/ Emile E. Martin, III
EMILE E. MARTIN, III
Judge

May 25th, 1989.

NO. 92-1717

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

BROWN & ROOT, INC.,
Petitioner,

versus

STEPHEN A. MISTICH,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
LOUISIANA STATE COURT OF APPEAL,
FOURTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a punitive damage award was proper under the general maritime law for willful and wanton misconduct of a defendant.

LIST OF PARTIES

Respondents herein, Brandon L. Mistich, Rebecca Mistich Terrase and Shawn Mistich, are the children of original plaintiff, Stephen A. Mistich. Respondents were substituted in this litigation on January 5, 1990 subsequent to the death of their father.

Petitioner herein is Brown & Root, Inc., as identified in the Rule 29.1 Statement of its Petition for a Writ of Certiorari.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

DECISIONS BELOW vii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

CONCLUSION 15

APPENDIX A-1

TABLE OF AUTHORITIES

Page

THE AMIABLE NANCY, 16 U.S. (3 Wheat.) 546 (1818) ..... ***passim***

THE ARIZONA v. Anelich, 298 U.S. 110 (1936) 6

CEH, Inc. v. F/V SEAFARER, 1993 WL 156902 (D.R.I. May 13, 1993) 8, 9

Duplantis v. Texaco, 771 F. Supp. 787 (E.D. La. 1991) 6, 7, 8

Gallagher v. THE YANKEE, 9 F. Cas. 1091 (N.D. Cal. 1859) 4

Gaspard v. Taylor Diving & Salvage Co., Inc., 649 F.2d 372 (5th Cir. 1981) 11

Gore v. Turner, 563 F.2d 159 (5th Cir. 1977) 10

Hannon v. Waterman Steamship Corp., 1991 WL 88012 (E.D. La. May 22, 1991) 5, 6

Harper v. Zapata Offshore Co., 741 F.2d 87 (5th Cir. 1984) 11

Hines v. J. A. Laporte, Inc., 820 F.2d 1187 (11th Cir. 1987) 11

TABLE OF AUTHORITIES (cont'd)

Page

Holmes v. J. Ray McDermott & Co., 734 F.2d 1110 (5th Cir. 1984) 11

Kraljic v. Berman Enters., Inc., 575 F.2d 412 (2d Cir. 1978) 11, 12

In re Marine Sulphur Queen, 460 F.2d 89 (2d Cir.), ***cert. denied,*** 409 U.S. 982 (1972) 4

In re Merry Shipping, Inc., 650 F.2d 622 (5th Cir. 1981) ..... ***passim***

Miles v. Apex Marine Corp., 498 U.S. 19 (1991) ..... ***passim***

Miller v. American President Lines, Ltd., 1993 WL 78689 (6th Cir. March 23, 1993) 12

Mistretta v. United States, 488 U.S. 361, 385 (1989) 11

Morales v. Garijack, Inc., 829 F.2d 1355 (5th Cir. 1987) 11

Muratore v. M/S SCOTIA PRINCE, 845 F.2d 347 (1st Cir. 1988) 4

Olsen v. THE SCOTLAND, 42 F. 925 (S.D.N.Y. 1890) 11

In re P & E Boat Rentals, Inc., 872 F.2d 642 (5th Cir. 1989) 4

TABLE OF AUTHORITIES (cont'd)

Page

Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc., 767 F.2d 1379 (9th Cir. 1985) 4

Ridenour v. Holland Am. Line Westours, Inc., 806 F. Supp 910 (W.D. Wash. 1992) 11

Robinson v. Pocahontas, Inc., 477 F.2d 1048 (1st Cir. 1973) 11

United States v. Reliable Transfer Co., 421 U.S. 397 (1975) 13, 14

United States Steel Corp. v. Fuhrman, 407 F.2d 1143 (6th Cir. 1969) 4

Yelverton v. Mobile Laboratories, Inc., 782 F.2d 555 (5th Cir. 1986) 11

Statutes

46 U.S.C. §688 - The Jones Act ..... ***passim***

U.S. Const. art. III, §2 11

DECISIONS BELOW

1. Judgment in favor of original plaintiff, Stephen A. Mistich, in the 25th Judicial District Court for the Parish of Plaquemines, State of Louisiana, dated April 28, 1989.

2. Decision of the Louisiana Court of Appeal, Fourth Circuit, amending and affirming the judgment in favor of plaintiff, dated November 17, 1992.

3. Order of the Supreme Court of the State of Louisiana denying a writ of certiorari filed by Brown & Root, Inc., dated March 12, 1993.

STATEMENT OF THE CASE

In June 1976, twenty-three year-old Stephen A. Mistich went to work offshore as a pipe welder for Brown & Root, Inc. on its pipelaying barges. In 1986, he was diagnosed with chronic myelogenous leukemia which was subsequently determined to be a result of his continuous exposure to hazardous levels of gamma radiation from x-ray cameras utilized by Brown & Root in its pipelaying process. In December 1986, Stephen A. Mistich filed suit against Brown & Root, and other former employers, for his injuries. He asserted a claim for negligence pursuant to the Jones Act, 46 U.S.C. §688, a general maritime law claim for unseaworthiness, and a general maritime law claim for the willful and wanton misconduct of Brown & Root.

On April 28, 1989, the Twenty-fifth Judicial District Court for the Parish of Plaquemines in the State of Louisiana found Brown & Root negligent, its vessels unseaworthy, and its conduct willful and in total disregard of plaintiff's rights. The trial court awarded Stephen A. Mistich compensatory damages for negligence and unseaworthiness in the amount of $3,147,608.00 and punitive damages in the amount of $4,000,000.00. The punitive damages against Brown & Root were awarded by the court in an "attempt to get the defendant's attention by assessing an amount of punitive damages that will hopefully bring about an alteration of their pipelaying vessels to save those other workers who, like the plaintiff, may be still exposed to hazard." (See Appendix A).

The evidence at trial established that the State of Louisiana, Department of Environmental Quality, inspected Brown & Root pipelaying barges on three occasions to determine the existence of radiation hazards to workers on these barges. The inspections were made in 1967, 1969 and 1976 and revealed that

certain Brown & Root workers were exposed to excessive radiation from x-raying activities aboard these barges and were subjected to levels of radiation exposure grossly in excess of the maximum quarterly allowable dosage established by federal and state regulatory agencies. The 1969 report concluded that personnel in the bunk room adjacent to the x-ray station were exposed to as much as 89,000 millirems per week, 10,000 times the permissible level under state and federal regulations. Brown & Root management was notified each time of the findings and warned of the hazards to its workers. Nevertheless, Brown & Root chose to ignore the warnings and failed to take the measures recommended by the State to remove the hazards.

In the opinion of the trial court, which weighed the evidence before it:

> The court is shocked and incensed by the conduct of Brown and Root, Inc., in this case. Its management, assuming lay ignorance, was specifically warned of the hazards to its workers over a ten year period and chose to intentionally ignore those warnings.... This court would be remiss and insensitive were it not to conclude that Brown and Root's conduct was willful, callous, and in total disregard of the rights of its employees...
>
> Ten years of warnings, which if heeded, could have saved this young man, were intentionally ignored by defendants herein. (See Appendix A).

The Louisiana Fourth Circuit Court of Appeal upheld the trial court's finding that Brown & Root was guilty of willful and wanton misconduct regarding the safety of Stephen A. Mistich

and affirmed the award of punitive damages. The Supreme Court of Louisiana clearly indicated its position on such an award when it denied Brown & Root's application for a writ of certiorari on March 12, 1993.

SUMMARY OF ARGUMENT

The availability of punitive damages under the general maritime law is not an unresolved issue, but rather, a well-established principle in law dating back almost two centuries. This Court first recognized a cause of action under the general maritime law to recover punitive damages due to the intentional, willful and wanton misconduct of a party in ***THE AMIABLE NANCY***, 16 U.S. (3 Wheat) 546 (1818). Maritime courts have continued to recognize such damages when the misconduct of a party is of an egregious nature.

Although punitive damages are viable under the general maritime law for willful and wanton behavior, petitioner requests this Honorable Court to review this case due to an alleged conflict which exists among the federal circuit courts as to the availability of punitive damages under a general maritime claim of unseaworthiness. General maritime law claims for punitive damages due to willful and wanton misconduct are, however, different from general maritime law and Jones Act claims for damages due to unseaworthiness and negligence.

Respondents respectfully observe that the award for punitive damages in this case is based not on unseaworthiness, but on a general maritime law claim for willful and wanton misconduct, a cause of action, which has been consistently recognized since as far back as ***THE AMIABLE NANCY.*** Consequently, there is no conflict as alleged by petitioner. The

right of respondents to recover the damages awarded herein on the basis of Brown & Root's egregious conduct is separate and distinct from rights later created under the Jones Act. Respondents respectfully submit that review by this Honorable Court is unnecessary.

ARGUMENT

As early as 1818, this Court awarded punitive damages under general maritime law due to intentional, willful and wanton misconduct. ***THE AMIABLE NANCY***, 16 U.S. (3 Wheat) 546 (1818); ***Gallagher v. THE YANKEE***, 9 F. Cas. 1091 (N.D. Cal. 1859). This trend of awarding such damages under the general maritime based upon willful and wanton conduct has continued in the federal courts. ***United States Steel Corp. v. Fuhrman***, 407 F.2d 1143 (6th Cir. 1969); ***In re Marine Sulphur Queen***, 460 F.2d 89 (2nd Cir. 1972); ***In re Merry Shipping, Inc.***, 650 F.2d 622 (5th Cir. 1981); ***Protectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc.***, 767 F.2d 1379 (9th Cir. 1985); ***Muratore v. M/S SCOTIA PRINCE***, 845 F.2d 347 (1st Cir. 1988); ***In re P & E Boat Rentals, Inc.***, 872 F.2d 642 (5th Cir. 1989).

The well-recognized standard for imposing punitive damages was, and still is, set forth in ***In re Merry Shipping, Inc.***, 650 F.2d 622 (5th Cir. 1981). Petitioner interprets the case of ***Miles v. Apex Marine Corp.***, 498 U.S. 19 (1990) as overruling this longstanding precedent recognizing a cause of action under the general maritime law to recover damages for the intentional, willful and/or wanton misconduct of a party.

The lower court cases cited by Petitioner which adopt its interpretation of ***Miles*** are clearly inapposite to the present case. The ***Miles*** holding is limited and cannot be extended to eliminate

such a longstanding cause of action as the recovery of punitive damages. In fact, respondents trust that had this Court in ***Miles*** intended to override precedent dating back almost 200 years, it would have expressly done so. This is abundantly apparent since punitive damages were addressed and recognized in the lower courts in the ***Miles*** case. The issue upon which this application for writs is based is whether a cause of action exists under the general maritime law for Mistich to recover punitive damages due to the intentional, willful and wanton misconduct of Brown & Root. This Court did not address this issue in ***Miles***.

This Honorable Court in ***Miles*** expressly stated that it was granting *certiorari* on only two issues:

1. Whether a parent of a deceased seaman can recover for loss of society under general maritime law due to the unseaworthiness of a vessel; and

2. Whether the estate of a deceased seaman can recover for the future lost earnings of a seaman under general maritime law due to the unseaworthiness of a vessel.

Thus, the ***Miles*** case questioned only the type of compensatory damages recoverable due to the unseaworthiness of a vessel under the general maritime law. The ***Miles*** holding is limited in this respect.

The court in ***Hannon v. Waterman Steamship Corp.***, 1991 WL 88012 (E.D. La. May 22, 1991), properly recognized the limitations of the ***Miles*** holding. The court stated:

> The Court's decision [in ***Miles***] was limited to excluding recovery of these two elements of compensatory damages and did not address the right of the seaman's

> survivor to recover punitive damages which are noncompensatory in nature.

Id. at 1.

The court in ***Hannon*** further recognized that the "***Miles*** decision does not provide a basis for overruling longstanding precedent recognizing the right to assert a claim for punitive damages under the general maritime law." ***Id.***

In addition to the ***Hannon*** case, the United States District Court for the Eastern District of Louisiana in the case of ***Duplantis v. Texaco***, 771 F. Supp. 787 (E.D. La. 1991) also acknowledged that a cause of action exists to recover punitive damages under the general maritime law. The court in ***Duplantis*** determined that ***Miles*** did not eliminate a seaman's cause of action for punitive damages.

The ***Duplantis*** case held that ***Miles*** and other cases extending the ***Miles*** holding to eliminate a cause of action for punitive damages, are "obviously inapposite." Also, the ***Duplantis*** court observed that the Jones Act did not intend to disturb seamen's general maritime law claims which pre-existed the enactment of the Jones Act in 1920, including claims for maintenance and cure and punitive damages. The Jones Act "was remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it." ***THE ARIZONA v. Anelich***, 298 U.S. 110 (1936).

It is important to note that the court recognized and understood that a cause of action exists for recovery of punitive damages due to willful and wanton conduct under the general maritime law, separate and apart from any action based on unseaworthiness.

The ***Duplantis*** court stated:

> The basic premise of ***[Miles v.] Apex Marine***, *supra*, was rather uniformity and the intended role of the Jones Act in effecting that constitutionally required uniformity in that exercise of admiralty jurisdiction. Tacking back to the point in time where the Jones Act became law, the general maritime law provided no recovery for what ailed the injured seaman's spouse. Accordingly, there being no recognition of spousal recovery for loss of consortium, the Court concluded ipso facto, neither did the Jones Act.
>
> Whether characterized as pecuniary or nonpecuniary damages, as early as ***The Amiable Nancy***, *supra*, **the general maritime law contemplated punitive damages for gross and wanton conduct in an action under the general maritime law not based on unseaworthiness**
>
> . . . .
>
> The case at bar involves plaintiff's claim under the general maritime law for injuries resulting not from unseaworthiness, but rather on account of defendant Texaco's alleged willful and wanton failure to remove debris from plugging and abandoning operations and to mark the areas where such plugging and abandoning occurred. Plaintiff's suit is not a suit under the Jones Act, rather it comes under the general maritime law and includes allegations to the effect that Texaco willfully violated its duty owed as a mineral leaseholder.
>
> In other words, this court is of the opinion that ***[Miles v.] Apex Marine***, ***Donaghey***, and ***MARDOC***,

> *supra*, cited in Texaco's brief for the proposition that recovery under the general maritime law are limited to pecuniary damages only, are thus obviously inapposite.

Id. at 788-89 (Emphasis added).

In a recent decision, ***CEH, Inc. v. F/V SEAFARER***, 1993 WL 156902 (D.R.I. May 13, 1993), the federal district court in Rhode Island followed the reasoning in ***Duplantis***. The court stated:

> In ***Duplantis***, a claim for punitive damages was filed under the general maritime law for injuries not based on unseaworthiness but on defendant's alleged willful and wanton conduct and, therefore, the district court found ***Miles*** "inapposite" and allowed the claim. ***Id.*** at 789. The same situation exists here. The claim by plaintiffs is pursuant to general maritime law and not pursuant to any statute or unseaworthiness claim. Consequently I find ***Miles*** not controlling here as it deals with recovery of damages under the Jones Act and DOSHA and the need to compel uniformity in general maritime law with these statutory remedies. I do not read ***Miles*** to mean that there can be no recovery of punitive damages in any claim under general maritime law. Since general maritime law has recognized claims for punitive damage for well over a century and there has been no total bar to these claims under general maritime law, then claims for punitive damages remain viable under general maritime law except as specifically held otherwise by ***Miles***. Recovery of punitive damages in the type of claim presented by

these plaintiffs has not been prohibited.

. . . .

Since punitive damages have been contemplated in general maritime law since 1818 and I have not been cited to nor have I found in my research any decision specifically prohibiting a claim for punitive damages under the circumstances presented by this case, I hold that plaintiffs have a claim under general maritime law for punitive damages based upon allegations of willful, reckless and malicious misconduct of the individual defendants. Of course, plaintiffs still must prove their claim for punitive damages at trial, but that is left to another day.

Id. at 4-5.

Petitioner's interpretation of the ***Miles*** holding, in essence, nullifies the entire body of general maritime law. This was not the intention of Congress when it enacted the Jones Act, nor, respondents assume, was it the intention of this Court when rendering the ***Miles*** decision. In fact, this Court in ***Miles*** recognized that:

> The Jones Act provides an action in negligence for the death or injury of a seaman.... The Jones Act evinces no general hostility to recovery under maritime law. It does not disturb seamen's general maritime claims . . .[1]

Id. at 324.

[1] Otherwise, an argument could be made that the Jones Act remedy was a substitute for traditional maintenance and cure. Such an argument would have received the same short shrift that should be given petitioner's argument here.

Petitioner's argument that ***Miles*** puts in dispute whether punitive damages are recoverable any longer under the general maritime law is unfounded. Even petitioner was forced to admit that "[t]he Court of Appeal is, of course, quite correct that ***Miles*** involved damages for loss of society, not punitive damages. Thus, like the Court below, we recognize that the present case is not controlled a fortiori by ***Miles.***" Petition for Writ of Certiorari at 16. Thus, as petitioner readily admits, the case at bar is simply not a case that is covered under ***Miles***. Petitioner's attempt to use ***Miles*** to abrogate over two centuries of this Honorable Court s jurisprudence is untenable.

In re Merry Shipping, Inc., 650 F.2d 622 (5th Cir. 1981), affirmed the availability of punitive damages under the general maritime law. The court reasoned that "punitive damages, long established in our legal system, may be recovered when a wrongdoer has acted willfully and with gross disregard for the plaintiff's rights. They serve the purpose of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example." ***Id***. at 625.

It is important to note that in the process of granting punitive damages, the Fifth Circuit cited to the case of ***Gore v. Turner***, 563 F.2d 159 (5th Cir. 1977), which delved into the behavior required to invoke such special damages. "The award of punitive damages involves an evaluation of the nature of the conduct in question, the wisdom of some form of pecuniary punishment, and the advisability of a deterrent to future illegal conduct." ***Id.*** at 164. Moreover, the Fifth Circuit in ***Merry Shipping*** remanded the case in order to allow the lower court to decide whether the facts were sufficient to submit to a jury the claim of punitive damages. ***Merry Shipping,*** 650 F.2d at 627. Therefore, it was the behavior of the defendant that guided the Fifth Circuit's award of punitive damages.

Petitioner's representation that the granting of certiorari in the case at bar "would almost certainly resolve th[e] conflict" over whether punitive damages are available under the general maritime law in maintenance and cure cases is misleading. In fact, in the proceedings below, the failure to pay maintenance and cure was never at issue. Consequently, the case at bar does not present an actual "case or controversy" on this issue within the meaning of Article III of the United States Constitution. It is well-established that it is not the business of this Court to grant advisory opinions. ***Mistretta v. United States***, 488 U.S. 361, 385 (1989).

Although the case herein has never involved the issue of failure to pay maintenance and cure, the longstanding acceptance as to the availability of punitive damages based upon willful and wanton behavior is reflected in this area of the general maritime law. Federal courts are united regarding the availability of punitive damages based upon an employer's willful and wanton failure to pay maintenance and cure. ***Olsen v. THE SCOTLAND***, 42 F. 925 (S.D.N.Y. 1890); ***Robinson v. Pocahontas, Inc.***, Inc., 477 F.2d 1048 (1st Cir. 1973); ***Gaspard v. Taylor Diving & Salvage Co., Inc.***, 649 F.2d 372 (5th Cir. 1981); ***Holmes v. J. Ray McDermott & Co.***, 734 F.2d 1110 (5th Cir. 1984); ***Harper v. Zapata Offshore Co.***, 741 F.2d 87 (5th Cir. 1984); ***Yelverton v. Mobile Laboratories, Inc.***, 782 F.2d 555 (5th Cir. 1986); ***Morales v. Garijack, Inc.***, 829 F.2d 1355 (5th Cir. 1987); ***Hines v. J. A. Laporte, Inc.***, 820 F.2d 1187 (11th Cir. 1987); ***Ridenour v. Holland Am. Line Westours, Inc.***, 806 F. Supp. 910 (W.D. Wash. 1992).

Petitioner's attempt to create a conflict on this issue by citing to the Second Circuit opinion in ***Kraljic v. Berman Enters., Inc.***, 575 F.2d 412 (2nd Cir. 1978) is untenable. The court in ***Kraljic*** did not state that punitive damages were unavail-

able, but held that punitive damages in some cases may be limited to counsel fees based upon the facts of that case. The court indicated however, that additional punitives may be available if the employer's failure to pay maintenance and cure aggravates a seaman's condition. ***Id.*** at 415.

It is undeniable that punitive damages for willful failure to pay maintenance and cure, as in other cases of willful and wanton misconduct under the general maritime law, are traditionally accepted and recoverable. There is no conflict between any of the circuit courts regarding this issue.

Petitioner attempts to create an additional conflict between the present case, a case based upon willful and wanton behavior, and the case of ***Miller v. American President Lines, Ltd.***, 1993 WL 78689 (6th Cir. Mar. 23, 1993), a case which dealt with the issue of whether punitive damages were recoverable in an unseaworthiness action for the wrongful death of a seaman. ***Miller***, unlike the instant case, did not involve the issue of whether an employer's behavior was willful and wanton in disregarding the safety of its workers. ***Miller*** solely focused upon the condition of the vessel and not upon the employer's egregious behavior. Therefore, ***Miller*** has no applicability to the instant case, where a punitive damage award was based upon Brown & Root's willful and wanton systematic behavior in totally disregarding the safety of its workers for over ten years, despite repeated warnings from state authorities. This was no simple question of an isolated condition of unseaworthiness on a single vessel. This was a question of a long-standing, upper level corporate affirmative decision to totally and wilfully ignore safety.

Whether this Court would uphold ***Miller*** in determining that punitive damages are not available under the general mari-

time law for unseaworthiness after ***Miles***, is not the issue now before the Court. Although respondents contest the contention that punitive damages are no longer viable post-***Miles*** in an unseaworthiness action, it is only the issue of whether punitive damages can be awarded under the general maritime law for the egregious generalized corporate misconduct of Brown & Root which is presented in the case at bar. In light of the longstanding precedent recognizing punitive damages under such circumstances, respondents submit that there is no authority to question such an award.

Petitioner's writ further infers that this Court should grant review to consider the economic impact punitive damages may have on the maritime industry. However, petitioner clearly misplaces the focal point where the economic impact is truly felt. Priority should be placed on the economic effect a maritime defendant's willful misconduct has on the work place in terms of human lives. The consequences of an unsafe work environment is extremely costly in terms of medical expenses, physical pain and suffering, and disability, all of which take a tremendous toll on the work force. Justice dictates that a maritime defendant who is aware of a dangerous situation and who ignores it should be the party to bear the economic burden when an innocent person is injured or killed as a result of the danger. Punitive damages serve to deter such willful misconduct and promote the undertaking of remedial measures.

Maritime courts, concerned with public policy, created punitive damages under the general maritime law in order to punish companies such as Brown & Root for their willful and wanton behavior. Punitive damages are wholly a product of judicial decision-making, fashioned on the basis of tradition and policy long pre-dating the Jones Act. ***In re Merry Shipping, Inc.***, 650 F.2d 622 (1981); See e.g. ***United States v. Reliable***

Transfer Co., 421 U.S. 397 (1975). The award of these damages is the only mechanism available to compel companies like Brown & Root to make necessary and life-saving changes, which would otherwise be ignored.

Furthermore, it is a fallacy to suggest that the maritime industry as a whole will be adversely affected because of the few fact specific cases which warrant an award of punitive damages. These special damages have been awarded for centuries and the maritime industry has continued to survive and prosper. These damages are invoked only when the facts of a particular case reflect the egregious conduct that demands this special award. Brown & Root exhibited just such conduct in this case when it chose for over ten years to ignore warnings about the excessive radiation exposure workers like Stephen A. Mistich were being forced to endure.

Considering the intentional and egregious behavior exhibited by Brown & Root, the four million dollar punitive damage award was in no way excessive or unreasonable. The trial judge's award was directly in line with the compensatory damages of $3,147,608.00 (reduced to $2,874,478.00 by the appellate court). Moreover, the punitive damages were awarded by an experienced judge who was "shocked and incensed by the conduct of Brown & Root, Inc." His dismay was properly affirmed throughout the state appellate review. This was not a runaway jury verdict.

CONCLUSION

Nowhere in petitioner's writ does petitioner argue that punitive damages are no longer viable under the general maritime law for willful and wanton behavior. Such an argument would be illusory against the great weight and history of cases which have granted such damages based upon egregious behavior.

The recovery of punitive damages under the general maritime law for willful and wanton behavior remains viable. Clearly, there is no conflict in the jurisprudence that these damages are awarded under the general maritime law for willful and wanton behavior when particular fact situations dictate their necessity. Punitive damages were warranted in the instant case due to the willful and wanton conduct of Brown & Root in (1) intentionally failing to follow the recommendations of the state authorities for over ten years, (2) in knowing that its failure to follow state and federal regulations created a hazard to crew members such as Stephen A. Mistich, and (3) in thereby intentionally, willfully and wantonly disregarding the safety of Stephen A. Mistich.

In the instant case, the trial judge and the Louisiana Fourth Circuit Court of Appeal found that the facts compelled an award of punitive damages. As stated by the trial court, "[t]his Court would be remiss and insensitive were it not to conclude that Brown and Root's conduct was willful, callous, and in total disregard of the rights of its employees. No case could better fit the punitive damage prerequisite of the United States Fifth Circuit Court of Appeals in ***In re Merry Shipping Co.***, 650 F.2d 622 (1981) than the instant case." (See Appendix A). Punitive damages were expressly created and continue to exist under the general maritime law for cases such as the case of Stephen A. Mistich.

There is no dispute among the federal circuit courts that punitive damages are viable under the general maritime law for willful and wanton behavior, and because the particular facts of the instant case leave no doubt that the award of punitive damages was proper here, respondents respectfully request that this Court deny petitioner's application for writ of certiorari.

Respectfully submitted,

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APPENDIX A

25TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF PLAQUEMINES
STATE OF LOUISIANA
DIVISION "B"

No. 29-703

STEPHEN A. MISTICH

versus

PIPELINES, INCORPORATED, et al

Filed: May 25, 1989

/s/ Jeanine H. Kuhlman
Deputy Clerk

REASONS FOR JUDGMENT

The Court rendered Judgment in the above entitled and numbered cause on the 28th day of April, 1989, assessing compensatory and punitive damages against defendant, Brown and Root, Inc., in the total sum of $7,147,608.00.

Stephen A. Mistich, presently 35 years of age and a father of three legally adopted children, worked as a seaman/welder aboard various pipelaying barges owned by Brown and Root, Inc., Pipelines, Inc., Lennard Pipelines, Inc., Sea-Con Services, Inc., and Santa Fe International, Inc., over the period June 11, 1976-November 18, 1985.

On all the barges on which plaintiff worked over the aforesaid period, each weld would be x-rayed either by an internal, or external, x-ray machine. The evidence preponderates that external x-ray machines were predominantly used on the vessels on which plaintiff worked over the period in question, and further preponderates that the radiation source was typically 100 curies of Iridium-192. Each weld would be x-rayed following the finishing weld in the "capping" station. The external machine would make three shots of each weld of approximately thirty seconds duration. Each shot would cover a 120 degree section of the weld. The first weld would be shot from the top of the pipe downward; the second shot would be from the outboard side of the pipe inboard; and the third shot would be from the inboard side of the pipe outboard. The internal x-ray machine, which was infrequently used on the barges on which plaintiff worked, would shoot one 360 degree shot of the weld from the inside of the pipe in all directions. The plaintiff, William Reinhardt, "Buddy" Pruett, and Mitchell Tidwell testified that the barges would average eighty welds per day and that a majority of the x-rays would be shot in the "capping" station, as opposed to the designated x-ray station, with the capping welders six to eight feet away and unprotected. This testimony is basically uncontradicted. Defendant produced no evidence or testimony to refute plaintiff, Pruett, or Tidwell. The record contains a great deal of testimony by Brown and Root witnesses as to the policy and guidelines to be employed and implemented by the x-ray technicians but not any testimony as to whether these were actually carried out or enforced in connection with the day to day operation. The evidence establishes that this process of "moving up" to x-ray the welds was dictated and directed by Brown and Root, Inc., and was carried out in order to maintain a high level of production.

The crew quarters and crew facilities on which plaintiff worked were either directly below the "pipe alley", or immediately adjacent to the "pipe alley", the "pipe alley" being a trough on the port side of the vessel where the pipe moved along on rollers to receive its various services, including x-ray. The welders, like plaintiff, customarily slept in the quarters beneath their working stations, the theory being that a worker's replacement on an opposite shift would follow the "golden rule".

On pipelaying barges, the welders would tend to work in stations wherein the job performed most fitted their individual skill. Although the welders rotated from station to station on some barges, the evidence preponderates that the plaintiff herein most often worked in the capping station, which was the station closest to the x-ray station. Accordingly, he frequently slept in the quarters beneath, or adjacent to the x-ray station.

The evidence unequivocally established that the State of Louisiana, Department of Environmental Quality, Office of Air Quality and Nuclear Energy, on three occasions inspected pipelaying barges owned by Brown & Root, Inc., and McDermott, Inc., for the specific purpose of determining if there was a radiation hazard to the workers on the barges from the x-ray activities. The inspections were made in 1967, 1969, and 1976. Each report was sent to Brown & Root, Inc. management. The 1967 report was sent to Mr. Walter Gard, Manager of the Pipeline Department; the 1969 report was sent to Mr. George Batcheller, Jr., Safety Engineer; and the 1976 report was sent to Mr. Claude Adams, Safety Supervisor, and Mr. W. C. Jones, Terminal Manager. The 1967 report put Brown and Root, Inc., on notice that the workers in stations adjacent to the x-ray station were subject to radiation exposure in excess of the maximum quarterly allowable dosage, established by the United States Nuclear Regulatory Commission, 10 CFR ch. 1, Part 20, and adopted by Louisiana through the Department of Environmental Quality,

Office of Nuclear Energy, as an agreement state, Title 33 of the Louisiana Radiation Regulations, Part 15, Ch. 4, page 95, et seq. The report specifically cautioned Brown and Root, Inc., that personnel monitoring be provided in order to adequately determine the radiation exposure of the workers in the area adjacent to the x-ray station, or alternatively, that fixed shielding be provided to intercept the scattered radiation from the x-ray activities. The evidence clearly establishes that Brown & Root, Inc., did not furnish the workers with the monitoring suggested and did not install the fixed shielding to intercept the scattered radiation. Finally, the report cautioned that persons in the living quarters might be exposed to excessive radiation if radioactive materials, such as Iridium-192, were used. Pruett testified that on one occasion a monitoring device was to be installed in the crew quarters, which was done but no results were revealed to any welder and no official report was made and if made was not presented at trial.

The 1969 report, based on work load calculations provided by Brown & Root, Inc., concluded that personnel in the bunk room adjacent to the x-ray station would be exposed to 89,000 mR per week, which would be 10,000 times the permissible level of 10mR per week maximum under the aforesaid applicable regulations. The report went on to recommend the installation of 2.5 inches of lead shielding, seven feet aft and seven feet forward of the x-ray station on the pipe alley deck; on the pipe alley bulkhead between the pipe alley and the bunk area; and three feet back from the pipe alley bulkhead on the main deck above the bunk area. The intention of the foregoing being to totally insulate the crew in the bunk, and living areas, below the x-ray station from radiation. The report went on to recommend 1.6 inches of lead or 11 inches of concrete seven feet high running the fourteen foot length of the x-ray area to protect personnel on deck from radiation. None of the foregoing were done by Brown and Root, Inc. The 1976 report confirms Brown and Root, Inc.'s

non-compliance with the 1967 and 1969 reports because it established the presence of only .25 inches of lead on a portion of the bulk head between the pipe alley and the bunk space. It discloses no lead on the deck of the pipe alley, no lead on the top of the bunk area, inadequate lead between the bunk area and the pipe alley, and no lead shield to protect the personnel on deck. The 1976 report went on to establish the potential of excessive allowable radiation exposure and recommended the installation of a 2-1/2 inch lead, or fourteen inch concrete, enclosure above, inboard and below the x-ray station to protect personnel on deck and personnel in the bunk area, or living quarters. Every witness, including Brown and Root's witnesses, testified that the 1976 recommendations of the Louisiana Division of Radiation Control were never complied with by Brown and Root, Inc. All of the foregoing inspections and recommendations occurred prior to the time that plaintiff went aboard a Brown and Root, Inc. pipelaying barge in 1976.

Every adult lay person in this country knows that radiation is an ultra-hazardous activity and that those persons working with, or around, it on a daily basis must insulate themselves therefrom with lead lining. The court is shocked and incensed by the conduct of Brown and Root, Inc., in this case. Its management, assuming lay ignorance, was specifically warned of the hazards to its workers over a ten year period and chose to intentionally ignore those warnings. In addition to the foregoing, a Brown and Root barge captain, Mr. "Buddy" Pruett testified that he requested lead from the Safety Department over a two-year period and was ultimately furnished with only .25 inch lead sheeting to insulate a portion of the bulk area on his barge. This Court would be remiss and insensitive were it not to conclude that Brown and Root's conduct was willful, callous, and in total disregard of the rights of its employees. No case could better fit the punitive damage prerequisite of the United States Fifth

Circuit Court of Appeals in ***In re: Merry Shipping Co.***, 650 F.2d 622 (1981) than the instant case.

All of the physicians that testified in this case concurred in plaintiff's diagnosis of chronic myelogenous leukemia. Additionally, every medical witness that testified concurred that exposure to excessive levels of radiation is an accepted cause of leukemia, and chronic myelogenous leukemia specifically. The foregoing accepted causal relationship originally grew out of the experience of radiologists thirty or forty years ago prior to the recognition of the necessity for lead shielding, and was confirmed by the unfortunate aftermath of Nagasaki and Hiroshima. In all of the foregoing unfortunate populations, grossly excessive levels of leukemia, including chronic myelogenous leukemia, were detected following radiation exposure. Dr. David Margileth and Dr. Lee Roy Morgan both testified that plaintiff's chronic myelogenous leukemia was, in their opinion, legally caused by his exposure to excessive levels of radiation. The court was impressed with the expertise, demeanor, candor, and honesty of these two dedicated physicians. Dr. Marcus Black and Dr. Carl Kardinal testified that they could not say that radiation exposure did, or did not, cause plaintiff's chronic myelogenous leukemia, although both admitted that they accepted the fact that radiation does cause plaintiff's type leukemia. Their vanilla testimony was of no help to the Court because neither was willing to render an opinion one way, or the other. Since an expert can only express an opinion, an expert that is unwilling to express an opinion adds nothing to the decision making process. The testimony of Dr. William Stein, who saw the plaintiff on one occasion, is totally disregarded by the Court. Dr. Stein's adversarial demeanor and willingness to make unsupported and unwarranted conclusions, leads this court to conclude, as a matter of fact, that his testimony is unworthy of belief. The court further noted that Dr. Stein relied only on treatises and writings

of other medical doctors, however the testimony of all other Doctors testifying was very positive, that no case histories, by the very nature of the disease, had ever been conducted by the medical profession, therefore the court concluded that the testimony of Dr. Stein is based solely on theories expounded by the persons he quoted and on which he based his opinion on.

The standards for protection against radiation passed by the United States Nuclear Regulatory Commission, and the standards for protection against radiation passed by the Louisiana Office of Nuclear Energy, aforecited, were specifically passed for the purpose of protecting the American and Louisiana worker from the hazard, among others, of cancer and leukemia associated with excessive radiation exposure. Those regulatory bodies recognized that exposure to greater than 0.5 rem in any one calendar year places the exposed person at risk of cancer or leukemia.

Mr. Ronald Wascom, an employee of the Louisiana Division of Radiation Control, and the author of the 1976 report, testified that the plaintiff herein was exposed throughout his employment, to levels of radiation greatly in excess of the maximum annual allowable, and the court as a matter of fact, concludes that to be the case based on all of the evidence brought out at the trial including, but not limited to, the testimony of Mr. Wascom.

The Court finds, as a matter of fact, that the plaintiff's chronic myelogenous leukemia was directly caused by his exposure to excessive levels of radiation.

The Court as a matter of fact, also finds that the vessels on which plaintiff worked for Brown and Root, Inc., were unseaworthy, and that Brown and Root, Inc., was negligent.

The Court concludes that the aforesaid unseaworthiness was the cause, and the aforesaid negligence a proximate cause, of plaintiff's contraction of leukemia, each theory of liability contributing equally to plaintiff's injuries and damages.

Plaintiff, as a matter of fact, was also exposed to excessive levels of radiation while working on barges owned by Pipelines, Inc., Lennard Pipelines, Inc., Sea-Con Service, Inc., and Santa Fe International, Inc., with whom the plaintiff settled 21 days prior to trial for the sum of $250,000.00. The settlement with these defendants is reflected in a stipulation filed in the record of the case prior to commencement of the trial against Brown and Root, Inc. The Court accepted plaintiff's testimony that the conditions were basically no different on the barges owned by the settling defendant than those heretofore described on the barges operated by Brown and Root, Inc. The only factual difference between the posture of the settling defendants is the absence of any prior inspection or warning, by any regulatory agency, and the fact that plaintiff's employment with the settling defendants, with the exception of Santa Fe International, Inc., preceded plaintiff's diagnosis of chronic myelogenous leukemia on January 19, 1986, by less than four years.

The Court considered the possible liability of the settling defendants for the purpose of apportioning fault as required under General Maritime Law.

The testimony of all of the physicians that testified in this case, and the Nagasaki and Hiroshima experiences, establishes, beyond a doubt, that there is a definite latency period between radiation exposure and the advent of symptoms of cancer, or leukemia, induced by radiation.

The Court finds as a matter of fact, that the applicable latency period is not less than three years, but more reasonably in excess of four years. Accordingly, plaintiff's employment with all of the settling defendants, with the possible exception of Santa Fe International, Inc., were subsequent to the latency period and, accordingly, had no causal relationship with plaintiff's contraction of chronic myelogenous leukemia. The Court further finds that plaintiff, during his employment with Santa Fe International, Inc., could have been exposed to radiation from x-ray for a maximum of seven days and concludes that such exposure, if within the latency period, is de minimis when compared with the length of exposure, (approximately 1,073 days), with Brown and Root, Inc. Therefore, the Court has concluded that plaintiff's exposure during his employment with Brown and Root, Inc., contributed 100% to his contraction of chronic myelogenous leukemia, whereas his employment with the settling defendants contributed 0%.

Turning now to the Court's evaluation of compensatory damages due by Brown and Root, Inc. to plaintiff, predicated upon the Court's heretofore determination of negligence and unseaworthiness, the Court, as a preamble, is constrained to cite the Louisiana First Circuit Court of Appeal decision in ***Wisner v. Illinois Central Gulf Railroad, et al***, 537 S.2d 740 (1988), wherein the Court affirmed, with moderate modifications, a $2,794,000.00 jury verdict in favor of a 35 year old Louisiana State Trooper. In the ***Wisner*** case, the plaintiff claimed damages for lung impairment and fear of cancer as a consequence of exposure to unconfirmed levels of toxic chemicals. In the instant case, the plaintiff has confirmed chronic myelogenous leukemia secondary to established levels of radiation grossly in excess of the maximum annual allowed exposure.

The Court was impressed by the testimony of Dr. Melville Wolfson, the plaintiff's economist, and the reasonableness of the acceptable criteria utilized by him in reaching his calculations. The Court on the other hand, found the testimony of defendant's economist, Dr. Dan Cliffe, to be devoid of acceptable criteria to impress this Court with the accuracy of his calculations. For instance, his utilization of present day earning factors and inflationary factors spanning seventy-five years preceding trial, do not measure up to a standard of objectivity. The Court finds as a matter of fact, that plaintiff sustained past lost wages in the sum of $83,912.00 and future lost wages in the sum of $804,397.00 both testified to by Dr. Melville Wolfson.

Dr. Margileth, and Dr. Carl Kardinal, testified that a bone marrow transplant, alone, one of the reasonably anticipated procedures that plaintiff will have to undergo, would cost between $100,000.00 and $1,000,000.00 depending on the rejection factor ever present in such a procedure. Plaintiff was hospitalized in a blast state one month preceding trial at a cost in excess of $50,000.00 and according to Dr. Margileth, is certain to be hospitalized for additional chemotherapy and radiation treatment prior to institution of a bone marrow transplant procedure. Therefore, the Court feels that an award for future medical expenses of $186,000.00 is conservative considering the foregoing testimony.

The parties stipulated to plaintiff's past medical bills totaling $73,298.78, reserving defendant's objection to the causality. The Court finds that the stipulated bills were in fact causally related to plaintiff's exposure to radiation and contraction of chronic myelogenous leukemia, and, accordingly, finds that amount due by defendant.

The Court can think of no set of circumstances that could possibly produce greater physical pain, mental anguish, fear of death, loss of ability to enjoy life, and loss of ability to pursue happiness than the set of circumstances that confronted and continued to confront the plaintiff in this case. The Court was moved by the sincerity, intelligence, desire for life, and determination to survive exhibited by this young man during the course of this trial.

The Court feels that an award of $800,000.00 for pain and suffering and $1,200,000.00 for mental anguish, both encompassing the other elements heretofore addressed, to be fair compensation for those elements of damage.

Ten years of warnings, which if heeded, could have saved this young man, were intentionally ignored by defendant herein. The State of Louisiana could not get the defendant's attention by direct notification to defendant's management personnel. It is incumbent upon this Court, therefore, to attempt to get the defendant's attention by assessing an amount of punitive damages that will hopefully bring about an alteration of their pipelaying vessels to save those other workers who, like the plaintiff, may be still exposed to hazard. The Court awards to the Plaintiff the sum of $4,000,000.00 in punitive damages for the foregoing reasons.

The Court, under the discretion vested in it, awards interest, at the legal rate provided under Louisiana Law, on one-half of the foregoing compensatory damage award attributable to the unseaworthiness responsibility of defendant from date of judicial demand and legal interest at the rate provided under

Louisiana Law, on the remainder of the judgment, compensatory and punitive, from date of judgment until paid.

The Court further casts defendant for all costs of these proceedings.

/s/ Emile E. Martin, III
Emile E. Martin, III
Judge

May 25th, 1989.

MOTION FILED
JUN 1 1993

No. 92-1717

In the Supreme Court of the United States

OCTOBER TERM, 1992

BROWN & ROOT, INC.,

Petitioner

v.

STEPHEN A. MISTICH,

Respondent

On Petition for a Writ of Certiorari to the Court of Appeal, Fourth Circuit, State of Louisiana

MOTION OF THE NATIONAL OCEAN INDUSTRIES ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS AND THE INTERNATIONAL ASSOCIATION OF GEOPHYSICAL CONTRACTORS FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AS AMICI CURIAE SUPPORTING PETITIONER

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MOTION OF THE NATIONAL OCEAN INDUSTRIES ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS AND THE INTERNATIONAL ASSOCIATION OF GEOPHYSICAL CONTRACTORS FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Pursuant to Rule 37 of the Rules of this Court, the National Ocean Industries Association (NOIA), the International Association of Drilling Contractors (IADC) and the International Association of Geophysical Contractors

(IAGC) respectfully move for leave to file the accompanying brief as amici curiae in support of petitioner in this case. Counsel for petitioner has consented to the filing of this brief,* but counsel for respondent has refused consent.

As outlined more fully below, amici are national trade associations that represent the interests of numerous companies involved in the development of our ocean resources. NOIA's membership ranges across a wide spectrum of ocean industries, while IADC's member companies are involved in offshore oil and gas drilling operations throughout the world and IAGC's member companies are involved in all phases of geophysical operations throughout the world. The question whether seamen may recover punitive damages under the general maritime law is of critical importance to the members of all three organizations, many of which are routinely exposed to Jones Act and general maritime litigation. NOIA, IADC and IAGC are intimately familiar with the issues in this case and can provide a perspective on these issues forged from everyday experience.

For the foregoing reasons, the motion of NOIA, IADC and IAGC to file the accompanying brief as amici curiae in support of petitioner should be granted.

Respectfully submitted.



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JUNE 1993

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* Petitioner's counsel's letter granting consent has been filed with the Court.

QUESTION PRESENTED

Whether punitive damages are available under the general maritime law in a seaman's unseaworthiness action against his employer.

TABLE OF CONTENTS

Page

INTEREST OF THE AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 4

THIS COURT SHOULD REVIEW THE DECISION BELOW BECAUSE IT CONFLICTS WITH A RECENT SIXTH CIRCUIT CASE, VIOLATES WELL-SETTLED ADMIRALTY PRINCIPLES, AND THREATENS THE ECONOMIC FUTURE OF THE MARITIME INDUSTRY 4

A. The Question Presented Has Powerful and Recurring Implications For All Segments of the Maritime Industry 4

B. This Court Should Resolve the Split in the Lower Courts Over Punitive Damages and Should Ensure Uniformity in Maritime Damages 8

1. The Conflict Between the Decision Below and the Decision of the Sixth Circuit is Squarely Presented 8

2. The Decision Below Departs From Well-Established Maritime Principles 9

CONCLUSION 14

TABLE OF AUTHORITIES

Page

Cases

Anderson v. Texaco, Inc., 797 F. Supp. 531 (E.D. La. 1992) 6

Bachu v. Int'l Marine Terminals, No. 91-1526, 1991 WL 211519 (E.D. La. Sept. 27, 1991) 5

Bedker v. Harvester Enter., 985 F.2d 571 (9th Cir. 1993) 5

Breshears v. River Marine Contractors, Inc., No. 92-1850, 1992 WL 245656 (E.D. La. Sept. 10, 1992) 5

Brown v. State of Alaska, 816 P.2d 1368 (Alaska 1991) 5, 8

City of Milwaukee v. Illinois, 451 U.S. 304 (1981) 12

Cockerham v. Diamond M Co., No. 65,405 (Tex. Dist. Ct. May 8, 1993) 7

Collinsworth v. Oceanic Fleet, Inc., No. 91-866, 1991 WL 165732 (E.D. La. Aug. 17, 1991) 5

Davis v. Penrod Drilling Corp., No. 91-1458, 1991 WL 264541 (E.D. La. Dec. 2, 1991) 9

Ellison v. Messerschmitt-Bolkow-Blohm, 807 F. Supp. 39 (E.D. Tex. 1992) 6

Gillespie v. United States Steel Corp., 379 U.S. 148 (1964) 12

TABLE OF AUTHORITIES - Continued

Page

Gray v. Texaco, 610 So. 2d 1090 (La. Ct. App. 1992), writ denied, ___ So. 2d ___ (La. 1993) 5

Hannon v. Waterman S.S. Corp., No. 90-1175, 1991 U.S. Dist. LEXIS 6823 (E.D. La. May 21, 1991) 9

In re Merry Shipping, Inc., 650 F.2d 622 (5th Cir. 1981) 8

Jenkins v. Kerr-McGee Corp., 613 So. 2d 1097 (La. Ct. App.), writ denied, ___ So. 2d ___ (La. 1993) 5

Knighton v. Tidex Marine, No. 92-0706, 1993 WL 53005 (E.D. La. Feb. 16, 1993) 5

LeBleu v. Mud Control Equipment Corp., No. 90-4248, 1991 WL 110406 (E.D. La. June 10, 1991) 5

Logue v. Tidewater, Inc., No. 91-1109, 1992 WL 59409 (E.D. La. Mar. 17, 1992) 9

Miles v. Apex Marine Corp., 498 U.S. 19 (1990) 3-5, 9-12

Miller v. American President Lines, Ltd., Nos. 91-3602/3837 (6th Cir. Mar. 23, 1993) 3, 6, 8-10, 13

Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978) 3, 4, 10-12

Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) 9, 11-13

TABLE OF AUTHORITIES - Continued

Page

New Jersey v. New York, 283 U.S. 336 (1931) 12

Odeco, Inc. v. Cornish, No. 90-0505, 1991 WL 148746 (E.D. La. July 22, 1991) 5

Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986) 13

Pacific Mutual Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991) 6, 7

Rollins v. Peterson Builders, Inc., 761 F. Supp. 943 (D.R.I. 1991) 6

Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974) 11

Sky Cruises, Ltd. v. Andersen, 592 So. 2d 756 (Fla. Dist. Ct. App.), cert. denied, 113 S. Ct. 466 (1992) 5

Stoufflet v. Apex Towing Co., Inc., No. 90-4476, 1991 WL 194759 (E.D. La. Sept. 20, 1991) 6

The Harrisburg, 119 U.S. 199 (1886) 12

The Lottawanna, 88 U.S. (21 Wall.) 558 (1875) 9, 12

Theriot v. McDermott, Inc., 611 So. 2d 129 (La. Ct. App. 1992), writ denied, 615 So. 2d 243 (La. 1993) 5

Williams v. Penrod Drilling Corp., 845 S.W.2d 349 (Tex. Ct. App. – Beaumont 1992) 5, 6, 8

TABLE OF AUTHORITIES - Continued

Page

Statutes

33 U.S.C. § 905(b) 11

46 U.S.C. § 688 2

46 U.S.C. §§ 761-768 10

Miscellaneous

BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *Employment and Earnings*, Section V, Table 2 (1993) 7

P. Huber, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988) 6

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BRIEF FOR THE NATIONAL OCEAN INDUSTRIES ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS AND THE INTERNATIONAL ASSOCIATION OF GEOPHYSICAL CONTRACTORS AS AMICI CURIAE SUPPORTING PETITIONER

INTEREST OF THE AMICI CURIAE

The National Ocean Industries Association (NOIA) is a national trade association that represents all facets of the

offshore oil and natural gas industries. NOIA's membership includes approximately 250 small, medium and large business enterprises engaged in such diverse activities as drilling, offshore construction, equipment manufacture, transportation, exploration, petroleum production, and others. NOIA is dedicated to the belief that the development of ocean energy resources will play an increasingly important role in the continued growth and prosperity of the United States.

The International Association of Drilling Contractors (IADC) represents the interests of drilling contractors throughout the world. Many of the more than 300 member companies of IADC drill for oil and gas in the offshore regions of the United States. IADC is dedicated to facilitating safe, efficient and environmentally responsible drilling operations in order to benefit its members, associated companies in oilfield services, and the public at large.

The International Association of Geophysical Contractors (IAGC) is an international organization of approximately 200 companies whose member companies are involved in offshore geophysical exploration operations throughout the world.

Because NOIA, IADC and IAGC members are at the forefront of developing the ocean resources, they frequently are involved in tort litigation based on the Jones Act, 46 U.S.C. § 688, and the general maritime law. All three organizations therefore are vitally concerned with a broad array of legal issues that affect the offshore industries. This case, in particular, presents a question of surpassing importance to the maritime community. As petitioner explains, the lower federal and state courts are sharply divided on the question whether punitive damages are available to seamen suing under the general maritime law. In addition to the direct costs of the damage awards themselves, that conflict creates substantial uncertainty within the maritime community and invites unjustified forum shopping by plaintiffs. Because the financially imperiled ocean

industries can ill afford such costs – and because such costs are legally unwarranted – we respectfully ask this Court to grant Brown & Root's petition.

INTRODUCTION AND SUMMARY OF ARGUMENT

Twice in the last 15 years, this Court has exercised its authority under the Admiralty Clause to conform the damages available under the general maritime law with the damages available under parallel federal statutes. *See Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978). In each of these cases, plaintiffs had sought to obtain a greater measure of damages under the general maritime law than they could have received under applicable congressional enactments. In each case, however, this Court rejected that effort in favor of a principle of uniformity. That uniformity principle is simple and straightforward: recovery under the general maritime law may not exceed the damages available under parallel statutory causes of action. The Louisiana Court of Appeal violated that principle, and it did so on an issue that has far-reaching implications for the offshore industries – the availability of punitive damages in a seaman's action against his employer under the general maritime law.

For three reasons, we believe that the petition should be granted. First, the availability of punitive damages has emerged in recent years as an issue of surpassing importance in maritime litigation, with lower courts and juries in coastal areas handing down decisions and verdicts in rapid-fire succession just in the two and one-half years since *Miles* was decided (including a $10 million punitive damages verdict less than three weeks ago). Such large punitive damage awards already have created severe economic pressures in an industry that can ill afford such financial exactions. Second, the Louisiana Court of Appeal's decision is in direct conflict with the recent decision of the U.S. Court of Appeals for the Sixth Circuit in *Miller v. American President Lines, Ltd.*, Nos. 91-

3602/3837 (Mar. 23, 1993). Finally, the decision below contravenes this Court's decision in *Miles* (and its antecedent, *Higginbotham*), both of which require courts to take their cues from statutory law in defining the contours of the general maritime law.

ARGUMENT

THIS COURT SHOULD REVIEW THE DECISION BELOW BECAUSE IT CONFLICTS WITH A RECENT SIXTH CIRCUIT CASE, VIOLATES WELL-SETTLED ADMIRALTY PRINCIPLES, AND THREATENS THE ECONOMIC FUTURE OF THE MARITIME INDUSTRY

A. The Question Presented Has Powerful and Recurring Implications For All Segments of the Maritime Industry

The use and development of the rich resources found in our oceans has fostered numerous businesses, large and small, dedicated to drilling, transportation, communications, offshore construction, geophysical exploration, research and technology, and more. These businesses are a major source of jobs and represent a key segment of the economy in the Gulf Coast region, which is the "home base" for much of the offshore activity connected with petroleum and gas production. Many other types of offshore industries, particularly those involved in shipping, towing and navigation, are spread throughout both coasts and the Gulf, and play important roles in the economic well-being of countless communities. Moreover, many of these industries – particularly those associated with energy production – have suffered significant financial setbacks in recent years as the maritime economy in general has declined.

Punitive damages have imposed special burdens of their own. Since *Miles* was decided, litigants have, with greater and greater frequency, sought punitive damages in lawsuits

based on general maritime law – and have done so in a wide range of factual and business contexts. In addition to the 17 post-*Miles* reported federal cases noted by petitioner (Pet. 19), our research reveals at least 16 unreported federal cases in which courts were confronted with a claim for punitive damages. Nine of those – also cited by petitioner (at Pet. 7 n.5; 9 n.7) – address the availability of punitive damages in claims based on unseaworthiness, while the remaining seven involve punitive damages for other general maritime claims brought by seamen against their employers.[1] And, in addition to the four post-*Miles* state cases cited by petitioner,[2] two other state courts (both in Louisiana) have confronted the issue as well.[3] Moreover, in view of this significant volume of accessible decisions, and the fact that many trial court decisions simply are not published, it is reasonable to suppose that there are additional cases that are available neither in the published reports nor through the electronic retrieval services.

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[1] *Bedker v. Harvester Enter.*, 985 F.2d 571 (9th Cir. 1993) (unpublished disposition); *Knighton v. Tidex Marine*, No. 92-0706, 1993 WL 53005 (E.D. La. Feb. 16, 1993); *Breshears v. River Marine Contractors, Inc.*, No. 92-1850, 1992 WL 245656 (E.D. La. Sept. 10, 1992); *LeBleu v. Mud Control Equipment Corp.*, No. 90-4248, 1991 WL 110406 (E.D. La. June 10, 1991); *Collinsworth v. Oceanic Fleet, Inc.*, No. 91-866, 1991 WL 165732 (E.D. La. Aug. 17, 1991); *Bachu v. Int'l Marine Terminals*, No. 91-1526, 1991 WL 211519 (E.D. La. Sept. 27, 1991); *Odeco, Inc. v. Cornish*, No. 90-0505, 1991 WL 148746 (E.D. La. July 22, 1991).

[2] *Jenkins v. Kerr-McGee Corp.*, 613 So. 2d 1097 (La. Ct. App.), *writ denied*, ___ So. 2d ___ (La. 1993); *Sky Cruises, Ltd. v. Andersen*, 592 So. 2d 756 (Fla. Dist. Ct. App.), *cert. denied*, 113 S. Ct. 466 (1992); *Williams v. Penrod Drilling Corp.*, 845 S.W.2d 349 (Tex. Ct. App. – Beaumont 1992); *Brown v. State of Alaska*, 816 P.2d 1368 (Alaska 1991).

[3] *Theriot v. McDermott, Inc.*, 611 So. 2d 129 (La. Ct. App. 1992), *writ denied*, 615 So. 2d 243 (La. 1993); *Gray v. Texaco*, 610 So. 2d 1090 (La. Ct. App. 1992), *writ denied*, ___ So. 2d ___ (La. 1993).

Not surprisingly, the defendants in the majority of these cases have been vessel operators and companies that perform offshore drilling operations. But a brief survey of the many punitive damages cases reveals that all segments of the maritime industry – representing numerous important sectors of the economy – have been powerfully affected by the issue presented in this case. *See, e.g., Anderson v. Texaco, Inc.*, 797 F. Supp. 531 (E.D. La. 1992) (major petroleum producer both offshore and on land); *Miller v. American President Lines, Ltd.*, Nos. 91-3602/3837 (6th Cir. Mar. 23, 1993) (several shipowners); *Stoufflet v. Apex Towing Co., Inc.*, No. 90-4476, 1991 WL 194759 (E.D. La. Sept. 20, 1991) (towing company); *Rollins v. Peterson Builders, Inc.*, 761 F. Supp. 943 (D.R.I. 1991) (marine construction company); *Theriot v. McDermott, Inc.*, 611 So. 2d 129 (La. Ct. App. 1992) (offshore oilfield service contractor), *writ denied*, 615 So. 2d 243 (La. 1993); *Ellison v. Messerschmitt-Bolkow-Blohm*, 807 F. Supp. 39 (E.D. Tex. 1992) (helicopter transportation company); *Williams v. Penrod Drilling Corp.*, 845 S.W.2d 349 (Tex. Ct. App. – Beaumont 1992) (offshore drilling company).

Notwithstanding (and perhaps because of) the conflict over the availability of punitive damages under the general maritime law, the flow of new cases shows no signs of abating. What is more, in those jurisdictions in which punitive damages are available, the magnitude of punitive damages continues an upward spiral – a trend with which many land-based industries have become fully familiar in recent years. *See Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1043 (1991) (O'Connor, J., dissenting) (expressing concern about "staggering" punitive damage judgments); P. Huber, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988) (discussing the marked increase in punitive damage awards in recent years). Indeed, just three weeks ago, a jury in Fort Bend County, Texas (outside Houston) awarded $10 million in punitive damages

against the Diamond M Co., a leading drilling contractor, for an injury to a seaman that resulted from the alleged unseaworthiness of an offshore rig. *Cockerham v. Diamond M Co.*, No. 65,405 (Tex. Dist. Ct. May 8, 1993).[4] Just as some offshore companies have fled certain jurisdictions because of the costs of litigation under the Jones Act, 46 U.S.C. App. § 688[5] one can expect increasing economic dislocation as a result of awards of punitive damages under the general maritime law.

But the direct costs of such awards are not all that is at stake. In addition, the ocean industries are subject to the inevitable transaction costs that arise from unsettled legal rules in an area fertile with litigation. Those costs are compounded, moreover, for the many companies that necessarily do business in more than one jurisdiction. Such companies are subject to lawsuits under the general maritime law in several jurisdictions and in both federal and state court. Taken together, these costs – both the damages themselves and the transaction costs of litigating them – threaten the very livelihood of industries that have suffered through a wrenching economic downturn in the last decade.[6]

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[4] Compensatory damages in the case, in which a roustabout suffered broken bones, a punctured kidney and a collapsed lung, totaled $2.5 million, leaving a ratio of punitive to compensatory damages of 4 to 1. The Court in *Pacific Mutual* considered such a ratio "close to the line" of constitutional infirmity. 111 S. Ct. at 1046.

[5] Officials at American Oilfield Divers, a leading diving company in the Gulf Coast region, have informed the President of NOIA that the company will move out of Brazoria County, Texas, because of the high cost of Jones Act litigation in that jurisdiction.

[6] For example, the petroleum and natural gas industries as a whole (a substantial portion of which is represented by offshore operations) lost 359,000 jobs between 1982 and the middle of 1992. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *Employment and Earnings*, Section V, Table 2 (1993).

This, then, is the setting within which the case comes before the Court: a recurring question of law, of surpassing importance, that vitally affects a wide array of maritime industries. And that question, as we briefly explain below, and as the petition states in more detail, is otherwise deserving of this Court's review: the decision of the Court of Appeal is in sharp conflict with the Sixth Circuit's decision in *Miller v. American President Lines, Ltd.*, *supra*, and contravenes important principles of uniformity and deference to congressional judgment.

B. This Court Should Resolve the Split in the Lower Courts Over Punitive Damages and Should Ensure Uniformity in Maritime Damages

1. The Conflict Between the Decision Below and the Decision of the Sixth Circuit is Squarely Presented

As petitioner explains in more detail (Pet. 6-14), the lower state and federal courts are sharply divided on the question whether seamen may recover punitive damages against their employers under the general maritime law. On the one hand, the court below, along with several other courts that are highly influential in maritime law (including state and federal courts in Louisiana and an appellate court in the coastal region of Texas), have upheld the availability of punitive damages. These cases include longstanding authority in the Fifth Circuit (*In re Merry Shipping, Inc.*, 650 F.2d 622 (1981)), on which the Louisiana Court of Appeal relied, as well as decisions in at least two other jurisdictions that have likewise followed *Merry Shipping* (*Brown v. State of Alaska*, 816 P.2d 1368 (Alaska 1991); *Williams v. Penrod Drilling*

Corp., 845 S.W.2d 349 (Tex. Ct. App. – Beaumont 1992)).[7]

On the other hand, the Sixth Circuit, in *Miller*, squarely held that punitive damages are *not* available to a seaman in a suit against his employer based on unseaworthiness. The Sixth Circuit reasoned that because punitive damages are non-pecuniary in nature, and because *Miles* limits a seaman only to pecuniary damages as are available under the Jones Act, punitive damages are unavailable as a matter of law. See *Miller*, slip op. at 13-14. The Sixth Circuit's decision, in short, is flatly inconsistent with the decision below.

This case presents an excellent vehicle for resolving that conflict. The relevant facts and issues in this case are identical to those in *Miller*. In both cases, suit was brought under the Jones Act alleging negligence and under the general maritime law alleging unseaworthiness. In both cases, the trial court allowed punitive damages, and the question on appeal was whether such damages are precluded as a matter of law. This Court should resolve that conflict so that – in this important respect, as in others – maritime law can function as "'a system of law coextensive with, and operating uniformly in, the whole country.'" *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 402 (1970) (*quoting The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875)).

2. The Decision Below Departs From Well-Established Maritime Principles

In addition to widening the conflict among the lower courts on the question of punitive damages, the decision

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[7] Several federal district court decisions in Louisiana are also in accord with the decision below. *Logue v. Tidewater, Inc.*, No. 91-1109, 1992 WL 59409 (E.D. La. Mar. 17, 1992); *Davis v. Penrod Drilling Corp.*, No. 91-1458, 1991 WL 264541 (E.D. La. Dec. 2, 1991); *Hannon v. Waterman S.S. Corp.*, No. 90-1175, 1991 U.S. Dist. LEXIS 6823 (E.D. La. May 21, 1991).

below contravenes two closely related and well-settled principles that have guided this Court's admiralty cases: uniformity of remedies between statutory and general maritime causes of action; and deference to the policy judgments made by Congress. Had the Louisiana Court of Appeal respected those principles, it would have reached the same judgment as the Sixth Circuit in *Miller*.

The Court's decision in *Higginbotham* illustrates those two principles. In *Higginbotham*, the representatives of three persons killed on the high seas brought suit under the Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 761-768, and the general maritime law. Two of the representatives recovered damages for their pecuniary losses, but the court of appeals, reversing the district court, held that they could also recover damages for loss of society, a non-pecuniary loss. 436 U.S. at 619-20. This Court reversed. The Court explained (*id.* at 623) that DOHSA limits recovery for death on the high seas to pecuniary damages, and it held that "DOHSA should be the courts' primary guide" in defining the remedies available under the general maritime law. *Id.* at 624. Reliance on DOHSA was essential, the Court observed, "both because of the interest in uniformity and because Congress' considered judgment has great force in its own right." *Id.* Applying those principles, the Court held that the damages available for deaths on the high seas could be no broader under the judicially-created wrongful death action than under DOHSA's wrongful death action. The Court thereby ensured that the representatives of all persons killed outside territorial waters would recover the same measure of damages regardless of the source of their action.

More recently, in the *Miles* decision, the Court applied the same principles of uniformity and deference to congressional judgment. The issue in *Miles* was whether a Jones Act seaman's representative, suing under the general maritime law theory of unseaworthiness for a death that occurred in coastal waters, could recover damages for loss of

society. Applying "[t]he logic of *Higginbotham*" (498 U.S. at 31), the Court looked to statutory law as the source for the remedies available under the general maritime law. Because loss of society damages are non-pecuniary, and because the Jones Act permits recovery only of pecuniary damages, the Court held that damages for loss of society could not be awarded to a seaman in a general maritime action. Uniformity and deference to Congress required that result: as the Court put it, "[i]t would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially-created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence." *Miles*, 498 U.S. at 32-33.[8]

The uniformity principle underlies not only the issue of damages, but the very existence of substantive causes of action under the general maritime law. Prior to the Court's decision in *Moragne v. States Marine Lines, Inc.*, *supra*, plaintiffs could bring a wrongful death action for all deaths on the high seas (under DOHSA), for deaths of seamen due to negligence regardless of where they occurred (under the Jones Act), and for deaths in territorial waters when an applicable state statute so provided. But state wrongful death statutes

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[8] *Miles* restored uniformity in another respect as well. Prior to the decision in *Higginbotham*, the Court had held that loss of society damages were recoverable in a general maritime wrongful death action for a death within the three-mile limit. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 591 (1974). *Higginbotham* made clear that such loss of society damages could not be awarded in an action arising outside coastal waters; as a result, plaintiffs were entitled to very different recoveries depending solely on whether their actions arose within or without the three-mile limit. The Court eliminated that lack of uniformity in *Miles*, by limiting the reach of *Gaudet* to longshoremen only (thus rendering it effectively inoperative, because longshoremen now are statutorily barred from suing their employers, see 33 U.S.C. § 905(b)). The Court thereby "restore[d] a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law." *Miles*, 498 U.S. at 33.

could not be applied to seamen killed in territorial waters as a result of unseaworthiness,[9] and indeed there was *no* recovery for wrongful deaths in territorial waters due to unseaworthiness in the absence of an applicable state statute.

In order to remedy these and other "anomalies" created by the patchwork of state and federal wrongful death statutes, the Court overruled its prior decision in *The Harrisburg*, 119 U.S. 199 (1886), and permitted a general maritime law action for wrongful death. In the Court's view, the uniformity thus engendered would "not only * * * further the concerns of both [the Jones Act and DOHSA] but also will give effect to the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.'" *Moragne*, 398 U.S. at 402 (*quoting The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875)).

The decision below contravenes the uniformity and deference principles reflected in *Moragne*, *Higginbotham*, and *Miles*. "Congress retains superior authority" in admiralty matters, so that when Congress legislates in this area, "an admiralty court should look primarily to these legislative enactments for policy guidance." *Miles*, 498 U.S. at 27. More generally, as the Court has often held, courts should defer to relevant congressional policy in *all* areas of federal common law. *City of Milwaukee v. Illinois*, 451 U.S. 304, 313-14 (1981). *See also New Jersey v. New York*, 283 U.S. 336, 348 (1931) (federal common law is "subject to the paramount authority of Congress"). And, of course, the duty of deference falls not only upon federal courts but also upon

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[9] Such seamen are covered by the Jones Act's wrongful death provisions, which allows recovery for deaths resulting from negligence and pre-empts state statutes applicable to seamen. *See Gillespie v. United States Steel Corp.*, 379 U.S. 148, 154-156 (1964).

state courts – like the Louisiana Court of Appeal – when they are engaged in applying federal common law.

In short, the Court's decisions make clear that where Congress has settled upon a measure of damages available to a particular class of persons or for accidents in a particular territory, courts may not supplement those statutes by allowing additional damages under the general maritime law. The Louisiana Court of Appeal clearly disregarded that settled principle by affording respondent an entitlement to punitive damages that he could not receive under the Jones Act. Because that decision is mistaken, and because it is in sharp conflict with the decision of the Sixth Circuit in *Miller*, the petition for a writ of certiorari should be granted.[10]

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[10] We also agree with petitioner that, separate and apart from the question of punitive damages in unseaworthiness actions, this case provides an opportunity to resolve the longstanding and persistent conflict among the federal courts over the availability of punitive damages in suits under the general maritime law for maintenance and cure. Although this case does not directly involve punitive damages for maintenance and cure, the rule of law that petitioner seeks in this case would likely resolve the maintenance and cure conflict as well. Just as this Court's decision in *Moragne* substantially settled the "tortuous development of the law of wrongful death in the maritime context," *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 212 (1986), a decision in this case would bring order to the confusing seascape of general maritime law remedies.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

BROWN & ROOT, INC., *Petitioner*

v.

STEPHEN A. MISTICH, *Respondent*

On Petition for a Writ of Certiorari to the Court of Appeal, Fourth Circuit, State of Louisiana

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

Page

Cases

CEH, Inc. v. *F/V Seafarer*, No. 92-0389L, 1993 WL 156902 (D.R.I. May 13, 1993) 4

Cockerham v. *Diamond M Co.*, No. 65,405 (Tex. Dist. Ct. May 8, 1993) 3

Duplantis v. *Texaco, Inc.*, 771 F. Supp. 787 (E.D. La. 1991) 4

Garner v. *Dravo Basic Materials Co.*, 768 F. Supp. 192 (S.D. W. Va. 1991) 9

Hines v. *J.A. Laporte, Inc.*, 820 F.2d 1187 (11th Cir. 1987) 7

In Re Merry Shipping, Inc., 650 F.2d 622 (5th Cir. 1981) 2, 5, 6

Kraljic v. *Berman Enters., Inc.*, 575 F.2d 412 (2nd Cir. 1978) 7

La Voie v. *Kualoa Ranch & Activity Club, Inc.*, 797 F. Supp. 827 (D. Haw. 1992) 8

Miles v. *Apex Marine Corp.*, 498 U.S. 19 (1990) 3, 8-10

Miles v. *Melrose*, 882 F.2d 976 (5th Cir. 1989), aff'd on other grounds, 498 U.S. 19 (1990) 10

Miller v. *American President Lines, Ltd.*, Nos. 91-3602/3837 (6th Cir. Mar. 23, 1993) 3, 5, 7

TABLE OF AUTHORITIES - Continued

Page

Muratore v. *M/S SCOTIA PRINCE*, 845 F.2d 347 (1st Cir. 1988) 4

Nelsen v. *Research Corp. of Univ. of Hawaii*, 805 F. Supp. 837 (D. Haw. 1992) 8

Protectus Alpha Navigation Co., Ltd. v. *North Pac. Grain Growers, Inc.*, 767 F.2d 1379 (9th Cir. 1985) 4

Ridenour v. *Holland Am. Line Westours, Inc.*, 806 F. Supp. 910 (W.D. Wash. 1992) 8

Sugden v. *Puget Sound Tug & Barge Co.*, 796 F. Supp. 455 (W.D. Wash. 1992) 9

The Amiable Nancy, 16 U.S. (3 Wheat) 546 (1818) 4

Miscellaneous

Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U.L. REV. 395 (1991) 10

Richard A. Posner, ECONOMIC ANALYSIS OF LAW (3rd ed. 1986) 10

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REPLY BRIEF FOR THE PETITIONER

As we explained at greater length in our petition, the state and federal courts are sharply divided on whether a Jones Act seaman may recover punitive damages in an unseaworthiness action under the general maritime law. The Louisiana Court of Appeal, following the Fifth Circuit's decision in *In Re Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir. 1981), held that punitive damages *are* available, and therefore affirmed a $4 million award against petitioner. Several other state and federal courts have taken the same view – including a decision only three weeks ago awarding a Jones Act seaman $10 million in punitive damages in a

general maritime law action in Texas state court.[1] By contrast, the Sixth Circuit in *Miller* v. *American President Lines, Ltd.*, Nos. 91-3602/3837 (Mar. 23, 1993), relying on this Court's decision in *Miles* v. *Apex Marine Corp.*, 498 U.S. 19 (6th Cir. 1990), squarely rejected the availability of punitive damages in a seaman's unseaworthiness action. Numerous other federal courts have taken this contrary view. See Pet. 7 n.5. The present case is a most appropriate vehicle for resolving the conflict.

Respondent opposes a grant of certiorari in three principal ways – first, by misconstruing the question presented; next, by papering over the conflict among the lower courts; and finally, by defending punitive damages on policy grounds. As we show below, none of these efforts is successful.[2]

1. Respondent devotes much of his brief to a question that is simply not at issue in the case. Indeed, at the very outset of his brief, respondent reformulates the question presented: in contrast to the petition itself – which asks "[w]hether punitive damages are available under the general maritime law in *a seaman's* unseaworthiness action *against his employer*" (Pet. i) – respondent addresses the much broader (but irrelevant) question whether punitive damages

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[1] *Cockerham* v. *Diamond M Co.*, No. 65,405 (Tex. Dist. Ct. May 8, 1993).

[2] Respondent also devotes a portion of his brief to a somewhat partisan factual presentation. While we do not propose to debate the evidence, we do wish to note that petitioner offered a very different factual account at trial. Petitioner presented evidence showing that both it and the companies that provided x-ray services properly monitored the pipelaying barges for exposure to radiation, and ensured that radiation did not exceed permissible levels. Petitioner also offered evidence that tended to negate any causal link between radiation exposure on its barges and respondent's disease.

are available in *any* setting under the general maritime law (Opp. i).

Respondent's reformulation misdirects the eye. We do not dispute that, where the facts warrant, punitive damages may be awarded under the general maritime law in cases that do not involve Jones Act seamen.[3] The question in this case, however, is whether a Jones Act seaman may sue his employer for punitive damages. It is *that* question on which the federal and state courts have divided, and to which the cases on which respondent relies do not speak. And it is that question, and only that question, on which petitioner seeks further review by this Court.

2. Respondent asserts (Opp. 4) that "[t]he well-recognized standard for imposing punitive damages was, and still is, set forth in *In re Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir. 1981)." He contends, moreover, that the Sixth Circuit's *Miller* case is not in conflict with *Merry Shipping* (and the decision below) because, in contrast to the latter

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[3] Thus, we do not quarrel with respondent's unremarkable suggestion that "[a]s early as 1818" this Court recognized the availability of punitive damages under the general maritime law. Opp. 4. We note in passing, however, that in *The Amiable Nancy*, 16 U.S. (3 Wheat) 546 (1818), the Court did *not*, as respondent mistakenly asserts (Opp. 4), "award[] punitive damages under general maritime law" (*ibid.*). The Court merely stated, in dictum, that such damages might be available in an appropriate case. Moreover, *The Amiable Nancy* was an action for marine trespass, not a claim by a seaman against his employer. Many of the other cases cited by respondent likewise involved claims by plaintiffs who were not the defendant's employees. See *Muratore* v. *M/S SCOTIA PRINCE*, 845 F.2d 347 (1st Cir. 1988) (action by cruise ship passengers for intentional infliction of emotional distress); *Protectus Alpha Navigation Co., Ltd.* v. *North Pac. Grain Growers, Inc.*, 767 F.2d 1379 (9th Cir. 1985) (action by vessel owner against land-based grain terminal owner for negligence in fighting fire); *Duplantis* v. *Texaco*, 771 F. Supp. 787 (E.D. La. 1991) (action for negligent maintenance of underwater equipment); *CEH, Inc.* v. *F/V Seafarer*, No. 92-0389L, 1993 WL 156902 (D.R.I. May 13, 1993) (action for damage to fishing equipment).

cases, *Miller* "did not involve the issue of whether an employer's behavior was willful and wanton in disregarding the safety of its workers" (Opp. 12). In respondent's view, "[g]eneral maritime law claims for punitive damages due to willful and wanton misconduct are * * * different from general maritime law and Jones Act claims for damages due to unseaworthiness and negligence" (Opp. 3).

Respondent's distinction is baseless. In *Miller* – as in *Merry Shipping* and in the present case – the plaintiff alleged that the defendant had wantonly and willfully caused unseaworthy conditions. As the Sixth Circuit explained, the district court in *Miller* awarded punitive damages based on a showing of "willful and wanton misconduct under the general maritime law of unseaworthiness." Slip op. at 14. Thus, respondent is simply mistaken in suggesting (Opp. 12) that "*Miller*, unlike the instant case, did not involve the issue of whether an employer's behavior was willful and wanton in disregarding the safety of its workers."

More generally, the distinction that respondent propounds (Opp. 3) – between claims for "willful and wanton misconduct," on the one hand, and "damages due to unseaworthiness" on the other – is illusory. Willful misconduct and unseaworthiness are not alternative claims. They are separate elements of a claim for punitive damages. In particular, a plaintiff will typically assert that because the defendant has "willfully and wantonly" created an "unseaworthy" condition, punitive damages should be awarded.

Merry Shipping itself involved such a claim. In that case, the Fifth Circuit explicitly held that "punitive damages may be recovered under general maritime law upon a showing of willful and wanton misconduct by the shipowner in the creation or maintenance of unseaworthy conditions." 650 F.2d at 623. After discussing the purposes of punitive damages and the types of actions that justify their award, the

court reiterated the point: "Punitive damages should be available when a shipowner has willfully violated the duty to furnish and maintain a seaworthy vessel." *Id.* at 625.

The Louisiana Court of Appeal made the same point in this case. Although respondent contends that the award of punitive damages in this case "is based not on unseaworthiness, but on a general maritime law claim for willful and wanton misconduct," the Court of Appeal clearly understood otherwise. Relying on *Merry Shipping*, the court stated that petitioner's "willful and wanton misconduct" constituted a breach of "its duty to furnish and maintain seaworthy vessels." Pet. App. 25a (emphasis added).[4]

There is, in short, no plausible distinction between *Merry Shipping* and its progeny (including the decision below) and the Sixth Circuit's decision in *Miller*. The decisions are clearly in conflict, and review by this Court is warranted.[5]

3. As we explained in the petition (Pet. 11-14), the ruling sought by petitioner in this case would almost certainly resolve the conflict among the lower federal courts and state courts concerning the availability of punitive damages in actions brought by seamen against their employers for failure to pay maintenance and cure. Respondent contends, however, that the "[f]ederal courts are united" (Opp. 11) on this point, and thus there is no conflict to resolve. That is not so.

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[4] Not surprisingly, in explaining why punitive damages were warranted in this case, the Court of Appeal pointed to the same evidence that it had identified in upholding the finding of unseaworthiness. See Pet. App. 8a-13a.

[5] Respondent ignores altogether the decisions of the Ninth Circuit, which has tried to steer a middle course on the question of punitive damages. See Pet. 9-10.

First, respondent misstates the Second Circuit's ruling in *Kraljic* v. *Berman Enters., Inc.*, 575 F.2d 412 (2nd Cir. 1978). *Kraljic* holds that punitive damages may *never* be awarded to a Jones Act seaman, over and above the award of counsel fees. The court of appeals did not, as respondent mistakenly suggests, limit its holding simply to "some cases" or to "the facts of that case" (Opp. 12). Nor did the Second Circuit suggest, even obliquely, that "additional punitives may be available if the employer's failure to pay maintenance and cure aggravates a seamen's condition" (*ibid.*). It is therefore not surprising that the Eleventh Circuit, in its more recent decision in *Hines* v. *J.A. Laporte, Inc.*, 820 F.2d 1187 (1987), noted that the "Circuits are divided" on the question whether punitive damages are available for failure to pay maintenance and cure. *Id.* at 1189.

Second, respondent ignores the very recent district court decisions, noted in our petition (at 13-14 n.11), that have taken conflicting positions on the question. These cases, as we noted, include two courts within the same federal district. Compare *Ridenour* v. *Holland Am. Line Westours, Inc.*, 806 F. Supp. 910 (W.D. Wash. 1992) (punitive damages are available in a general maritime law action for failure to pay maintenance and cure), and *Nelsen* v. *Research Corp. of Univ. of Hawaii*, 805 F. Supp. 837 (D. Haw. 1992) (same), with *La Voie* v. *Kualoa Ranch & Activity Club, Inc.*, 797 F. Supp. 827 (D. Haw. 1992) (punitive damages are not available).[6]

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[6] As we noted in the petition (Pet. 14), the present case does not itself involve a claim for maintenance and cure. Respondent contends that this Court would therefore be issuing an "advisory opinion" were it to address the question. But we are not asking the Court to *rule* on the question of maintenance and cure; we simply submit that the ruling we seek on the question presented will likely resolve the closely related question on maintenance and cure. There is nothing unusual, let alone unconstitutional, about granting review in part because a decision by this Court will clarify an area of law that is somewhat broader than the

4. Respondent asserts at several points (Opp. 5, 10) that *Miles* has no bearing on this case because it deals only with damages for loss of society, and not punitive damages. We do not contend, however, that *Miles directly* addresses the question presented. Rather, we contend that the *approach* taken in *Miles* applies here as well. Here, as in *Miles*, the question presented is whether a Jones Act seaman (or his survivor) may recover a type of damages that is not available under a parallel federal statute. Just as this Court held in *Miles* that the survivor of a Jones Act seaman may not recover for loss of society because such damages are not available under parallel statutes, so too should the court below have looked to a parallel statute (the Jones Act) in deciding whether punitive damages are available to a Jones Act seaman.

Respondent does not suggest that punitive damages are available under the Jones Act itself. He does contend, however, that punitive damages have been available under the general maritime law for "almost 200 years," and that if *Miles* is read as petitioner believes it should be, the case would "nullif[y] the entire body of general maritime law" (Opp. 5, 9). Again, however, respondent misapprehends the question presented in this case. We do not contend that *Miles* forecloses punitive damages in *all* cases under the general maritime law. Indeed, *Miles* cannot plausibly be read that broadly.[7] The question in this case, however – and the

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particular question presented.

[7] As we explained at greater length in the petition, the pecuniary damage limitation in *Miles* applies only in those lawsuits that are subject to parallel coverage under a particular federal statute. Thus, for example, where the Jones Act does not apply for one reason or another, post-*Miles* decisions have held that plaintiffs suing under the general maritime law are not limited solely to pecuniary damages. See, *e.g.*, *Garner* v. *Dravo Basic Materials Co.*, 768 F. Supp. 192 (S.D. W. Va. 1991) (parents of non-seaman who died in territorial waters could recover lost future

question to which the approach in *Miles* clearly applies – is whether a *Jones Act seaman* can recover punitive damages under the general maritime law in an unseaworthiness action *against his employer*. To answer that question as we believe it should be answered, this Court will not have to reconsider *any* of its prior decisions, let alone "nullify" the "almost 200 years" of its admiralty jurisprudence.[8]

5. Finally, respondent defends the decision below on a variety of policy grounds (Opp. 13-14). He argues, for example, that "[p]unitive damages are wholly a product of judicial decision-making, fashioned on the basis of tradition and policy long pre-dating the Jones Act" (Opp. 13). But that is exactly the kind of free-wheeling judicial authority that *Miles* forecloses. As the Court explained in *Miles*: "It would be inconsistent with [a court's] place in the constitutional scheme * * * to sanction more expansive remedies in a judicially-created cause of action in which liability is without fault than Congress has allowed in cases of death from negligence." 498 U.S. at 32-33.

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earnings, a measure of damages excluded under the Jones Act); *Sugden* v. *Puget Sound Tug & Barge Co.*, 796 F. Supp. 455 (W.D. Wash. 1992) (because Jones Act does not give seaman or representatives a cause of action against non-employers, family members could recover non-pecuniary damages in general maritime law action against shipyard that was not seamen's employer).

[8] *Miles* cannot be taken, as respondent implies (Opp. 5), as having somehow endorsed the availability of punitive damages to Jones Act seamen. The Court simply had no occasion in *Miles* "expressly" to address the availability of punitive damages. The plaintiff in *Miles* did *not* recover punitive damages in the trial court, and, after reviewing the evidence, the court of appeals agreed that there was insufficient evidence to warrant an award of punitive damages. *Miles* v. *Melrose*, 882 F.2d 976, 989 (5th Cir. 1989), aff'd in other grounds 498 U.S. 19 (1990). Not surprisingly, therefore, the petition to this Court for a writ of certiorari in *Miles* did not include any reference to the issue of punitive damages.

Respondent also contends (Opp. 14) that punitive damages are "the only mechanism available to compel companies like Brown & Root to make necessary and life-saving changes, which would otherwise be ignored." As an empirical matter, that is probably not so, in view of the deterrent impact of large compensatory awards – such as the award in this case.[9] In any event, even if courts were otherwise inclined to embrace punitive damages on policy grounds, they are not free to do so. Under *Miles*, courts must "look primarily to * * * legislative enactments for policy guidance." 498 U.S. at 27. Because Congress has foreclosed Jones Act seamen from recovering punitive damages in actions against their employers, courts are not free – on deterrence grounds, or any other – to award punitive damages under the general maritime law.

CONCLUSION

For the foregoing reasons, and the reasons stated in our petition, the petition for a writ of certiorari should be granted.

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[9] See, *e.g.*, Richard A. Posner, ECONOMIC ANALYSIS OF LAW 176-177, 191-195 (3rd ed. 1986); Block, *Optimal Penalties, Criminal Law and the Control of Corporate Behavior*, 71 B.U.L. REV. 395 (1991).

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